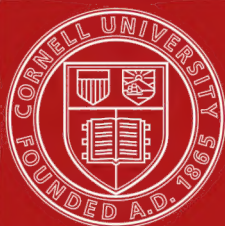


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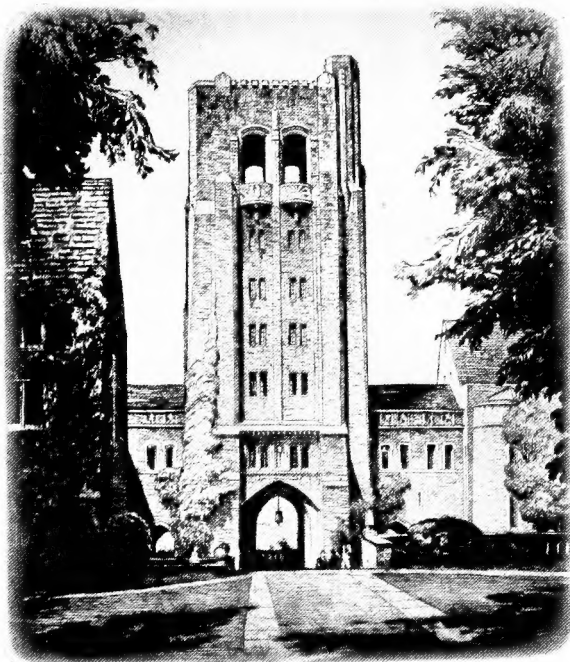
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COMMENTARIES

ON THE LAW OF

MASTER AND SERVANT

INCLUDING THE MODERN LAWS ON WORKMEN'S
COMPENSATION, ARBITRATION, EMPLOYERS'
LIABILITY, ETC., ETC.

BY

C. B. LABATT, B. A. (CANTAB.) M. A. (TORONTO)
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IN EIGHT VOLUMES

VOLUME VIII.

CONSTITUTIONALITY OF ENACTMENTS.
TABLES OF CASES.
INDEX.

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PREFATORY NOTE.

In view of the fact that Vòlùmē VII. is almost entirely the work of my collaborators, it will be advisable to mention that I am myself solely responsible for the whole of chapter cxxiv., with the exception of the last two sections.

C. B. LABATT.

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MASTER AND SERVANT.

VOLUME VIII.

CHAPTER CXXIV.

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- 2870a. Enactments prohibiting the employment of alien laborers.
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 - b. Medical practitioners.
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 - a. Employment agencies.
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PART I.

SUBJECT DISCUSSED WITH REFERENCE TO THE APPORTIONMENT OF
POWERS BETWEEN THE FEDERAL AND STATE LEGISLATURES.

A. FEDERAL ENACTMENTS.

2794. Enactments relating to the employment of aliens.—The original alien labor law by which the importation of certain classes of aliens under a contract to perform services was prohibited (see § 149, *ante*) has been declared valid by the Federal Supreme Court.¹

The constitutionality of the general enactment which prohibits certain classes of alien immigrants from landing in the United States has also been approved by that court.²

¹ *Lees v. United States* (1893) 150 U. S. 476, 37 L. ed. 1150, 14 Sup. Ct. Rep. 163 (act of February 26, 1885). A special point there raised was that the act was unconstitutional, in so far as it imposed a penalty upon persons who assisted in bringing into the country employees of the prohibited classes. Reference was made to *United States v. Craig* (1886) 28 Fed. 795, in which Mr. Justice Brown had held that there was nothing in the act which conflicted with the Constitution; to *Church of the Holy Trinity v. United States* (1892) 143 U. S. 457, 36 L. ed. 227, 12 Sup. Ct. Rep. 511, in which its constitutionality was assumed; to *Chae Chan Ping v. United States (Chinese Exclusion Case)* (1889) 130 U. S. 581, 32 L. ed. 1068, 9 Sup. Ct. Rep. 623, and to *Fong Yue Ting v. United States* (1893) 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016, which had affirmed fully the power of Congress over the exclusion of aliens. The count then proceeded thus: "Given in Congress the absolute power to exclude aliens, it may exclude some and admit others; and the reasons for its discrimination are not open to challenge in the courts. Given the power to exclude, it has a right to make that exclusion effective by punishing those who assist in introducing, or attempting to introduce, aliens in violation of its prohibition. The importation of alien laborers who are under previous contract to perform labor in the United States is the act renounced, and the penalty is visited not upon the alien laborer,—although, by the amendment of February 23, 1887 (24 Stat. at L. 414, chap. 220, U. S. Comp. Stat. 1901, p. 1290), he is to be returned to the country from which he came,—but upon the party assisting in the importation. If Congress has power to exclude such laborers, as, by the cases cited, it unquestionably has, it has the power to punish any who assist in their introduction."

The Act was also upheld in *Re Florio* (1890) 43 Fed. 114, following the *Craig Case, supra*.

² *Nishinura Ekiu v. United States* (1892) 142 U. S. 659, 35 L. ed. 1149, 12 Sup. Ct. Rep. 336 (act of March 3, 1891).

2795. Enactments relating to the wages of seamen.—It has been held that the enactment making it a misdemeanor to pay any seaman wages in advance, and declaring that such payment shall not absolve the vessel or its master or owner from full payment of wages actually earned, is a valid exercise of the power of Congress to regulate commerce;¹ that it is not an unwarrantable invasion of the liberty of contract;² and that Congress was not without power to enact that this provision should extend to seamen shipping in an American port on vessels engaged in foreign or interstate commerce, whether they belong to citizens of the United States or to aliens.

2796. Enactments limiting the hours of work.—The enactments which limit to eight hours in each day the employment of laborers and mechanics engaged upon any of the public works of the United States or of the District of Columbia have been pronounced constitutional.¹ This doctrine is based upon the principle that the

¹ *Patterson v. The Eudora* (1903) 23 Sup. Ct. Rep. 831, 190 U. S. 169, 47 L. ed. 1002 (act of December 21, 1898, § 24). The court said: "Neither do we think there is in it any trespass on the rights of the states. No question is before us as to the applicability of the statute to contracts of sailors for services wholly within the state. We need not determine whether one who contracts to serve on a steamboat between New York and Albany, or between any two places within the limits of a state, can avail himself of the privileges of this legislation, for the services contracted for in this case were to be performed beyond the limits of any single state, and in an ocean voyage. Contracts with sailors for their services are, as we have seen, exceptional in their character, and may be subjected to special restrictions for the purpose of securing the full and safe carrying on of commerce on the water. Being so subject, whenever the contract is for employment in commerce, not wholly within the state, legislation enforcing such restrictions comes within the domain of Congress, which is charged with the duty of protecting foreign and interstate commerce."

² Act of December 21, 1898, § 24. After quoting the general statement in *Frisbie v. United States* (1895) 157 U. S. 160, 39 L. ed. 657, 15 Sup. Ct. Rep. 586, that "the liberty of contract is not universal," the court proceeded thus: "If the necessities of the public justify

the enforcement of a sailor's contract by exceptional means, justice requires that the rights of the sailor be in like manner protected. The story of the wrongs done to sailors in the larger ports, not merely of this nation, but of the world, is an oft-told tale, and many have been the efforts to protect them against such wrongs. One of the most common means of doing these wrongs is the advancement of wages. Bad men lure them into haunts of vice, advance a little money to continue their dissipation, and, having thus acquired a partial control and by liquor dulled their faculties, place them on board the vessel just ready to sail and most ready to return the advances. When once on shipboard and the ship at sea, the sailor is powerless and no relief is availing. It was in order to stop this evil, to protect the sailor, and not to restrict him of his liberty, that this statute was passed. And while in some cases it may operate harshly, no one can doubt that the best interests of seamen as a class are preserved by such legislation."

¹ *Ellis v. United States* (1906) 206 U. S. 246, 51 L. ed. 1047, 27 Sup. Ct. Rep. 600, 11 Ann. Cas. 589 (act of August 1, 1892); *Penn Bridge Co. v. United States* (1907) 29 App. D. C. 452, 10 Ann. Cas. 719 (Code, §§ 892, 893, 31 Stat. at L. 1334, chap. 854).

In *United States v. Martin* (1876) 94 U. S. 400, 24 L. ed. 128, the validity of this statute had been taken for granted.

The legislative power of Congress may

Federal government has the right to prescribe the conditions upon which work shall be performed for it.

The enactment which limits the hours of labor with respect to employees engaged in the transportation of passengers and property by railroad in interstate and foreign commerce has been declared valid by the Federal Supreme Court. "Many employees who have to do with the movement of trains are, by virtue of practical necessity, also engaged in intrastate transportation."²

be exercised in regard to public works upon land not belonging to the United States. *United States v. San Francisco Bridge Co.* (1898) 88 Fed. 891.

² *Baltimore & O. R. Co. v. Interstate Commerce Commission* (1911) 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621. Act of March 4, 1907, chap. 2939, 34 Stat. at L. 1415, U. S. Comp. Stat. Supp. 1911, p. 1321. The court said: "The statute, therefore, in its scope, is materially different from the act of June 11, 1906, chap. 3073, 34 Stat. at L. 232, U. S. Comp. Stat. Supp. 1911, p. 1316, which was before this court in the *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) (1908) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141. There, while the carriers described were those engaged in the commerce subject to the regulating power of Congress, it appeared that if a carrier was so engaged, the act governed its relation to every employee, although the employment of the latter might have nothing whatever to do with interstate commerce. In the present statute, the limiting words govern the employees as well as the carriers. But the argument, undoubtedly, involves the consideration that the interstate and intrastate operations of interstate carriers are so interwoven that it is utterly impracticable for them to divide their employees in such manner that the duties of those who are engaged in connection with interstate commerce shall be confined to that commerce exclusively. . . . This consideration, however, lends no support to the contention that the statute is invalid. For there cannot be denied to Congress the effective exercise of its constitutional authority. By virtue of its power to regulate interstate and foreign commerce, Congress may enact laws for the safeguarding of the persons and property that are transported in that commerce, and of those who are em-

ployed in transporting them. *Johnson v. Southern P. Co.* (1904) 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; *Adair v. United States* (1908) 208 U. S. 177, 178, 52 L. ed. 443, 444, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; *St. Louis, I. M. & S. R. Co. v. Taylor* (1908) 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616; *Chicago, B. & Q. R. Co. v. United States* (1911) 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612. The fundamental question here is whether a restriction upon the hours of labor of employees who are connected with the movement of trains in interstate transportation is comprehended within this sphere of authorized legislation. This question admits of but one answer. The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. This has been repeatedly emphasized in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitably to provide for the safety of employees and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train dispatchers, telegraphers, and other persons embraced within the class defined by the act. And in imposing restrictions having reasonable relation to this end, there is no interference with liberty of contract as guaranteed by the Constitution. *Chicago, B. & Q. R. Co. v. McGuire* (1911) 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259. If, then, it be assumed, as it must be, that in the furtherance of its purpose Congress can limit the hours of labor of employees engaged in interstate transportation, it

It has also been held that the constitutional protection against unreasonable searches and seizures is not denied by an order of the Interstate Commerce Commission requiring the secretary or other similar officer of the carriers within the purview of this statute, to make monthly reports under oath, showing the instances in which employees to whom the act is applicable have rendered excess service, and giving the cause and explanatory facts, if any, or where there has been no excess service, to send in a separate sworn statement to that effect, in lieu of the form to be used in detailing excess service.³

2797. Enactments modifying the fellow servant doctrine. Generally.—It is now fully settled that “Congress, in the exertion of its power over interstate commerce, may regulate the relations of common carriers by railroad and their employees while both are engaged in such commerce, subject always to the limitations prescribed in the Constitution, and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employees are engaged.”¹

follows that this power cannot be defeated, either by prolonging the period of service through other requirements of the carriers, or by the commingling of duties relating to interstate and intrastate operations.”

The validity of the statute had previously been recognized in *State v. Chicago, M. & St. P. R. Co.* (1908) 136 Wis. 407, 19 L.R.A.(N.S.) 326, 117 N. W. 686.

³ See case cited in note 2, *supra*.

¹ *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) (1911) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875. There the court, in discussing the act of 1908, formulated the two following propositions as being, with several others, no longer open to dispute: “5. Among the instruments and agents to which the power extends are the railroads over which transportation from one state to another is conducted, the engines and cars by which such transportation is effected, and all who are in any wise engaged in such transportation, whether as common carriers or as their employees. 6. The duties of common carriers in respect of the safety of their employees, while both are engaged in commerce among the states,

and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power.” The same doctrine had previously been announced by an inferior court in *Watson v. St. Louis, I. M. & S. R. Co.* (1909) 169 Fed. 942.

In *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) (1908) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, affirming (1907) 148 Fed. 997, where the act of 1906 was under discussion, White, J., in stating the opinion of the court, which was unanimous on this point, said: “We may not test the power of Congress to regulate commerce solely by abstractly considering the particular subject to which a regulation relates, irrespective of whether the regulation in question is one of interstate commerce. On the contrary, the test of power is not merely the matter regulated, but whether the regulation is directly one of interstate commerce, or is embraced within the grant conferred on Congress to use all lawful means necessary and appropriate to the execution of the power to regulate commerce. We think the unsoundness of the contention that because the act regulates the rela-

2798. Same subject. Employers' liability act of 1906.—a. Validity in respect of the states.—In the case cited below, it was held by a bare majority of the members of the Federal Supreme Court that this act was invalid, for the reason that, "being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce." The justices who took this position rejected the contention, "that because the statute says carriers engaged in commerce between the states, etc., therefore the act should be interpreted as being exclusively applicable to the interstate commerce business and none other of such carriers, and that the words 'any employee,' as found in the statute, should be held to mean any employee when such employee is engaged only in interstate commerce."¹ It was observed that the acceptance of the contention would necessitate "writing into the statute words of limitation and restriction not found in it," and that, if the statute were modified in this manner, the result would be to restrict its operation with respect to the District of Columbia and the territories. It was also held that the subjects in regard to which Congress was competent to legislate were so blended in the act with subjects to which its constitutional powers did not extend that they could not be separated. Consequently the whole act must be pronounced invalid.² Four of the justices dissented from the decision rendered.³

tion of master and servant, it is unconstitutional, because, under no circumstances and to no extent can the regulation of such subject be within the grant of authority to regulate commerce, is demonstrable. We say this because we fail to perceive any just reason for holding that Congress is without power to regulate the relation of master and servant, to the extent that regulations adopted by Congress on that subject are solely confined to interstate commerce, and therefore are within the grant to regulate that commerce, or within the authority given to use all means appropriate to the exercise of the powers conferred."

For a case in which the doctrine in the text was affirmed by an inferior court, see *Zikos v. Oregon R. & Nav. Co.* (1910) 179 Fed. 893.

¹ *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) (1908) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, affirming (1907) 148 Fed. 997.

² By this ruling the authority of some decisions of inferior Federal courts which affirmed or assumed the validity of the act is destroyed, in so far as they turned upon that factor:—*Spain v. St. Louis & S. F. R. Co.* (1907) 151 Fed. 522; *Snead v. Central of Georgia R. Co.* (1907) 151 Fed. 608; *Malloy v. Northern P. R. Co.* (1907) 151 Fed. 1019; *Kelley v. Great Northern R. Co.* (1907) 152 Fed. 211; *Plummer v. Northern P. R. Co.* (1907) 152 Fed. 206; *Lancer v. Anchor Line* (1907) 155 Fed. 433 (carrier engaged in foreign commerce); *Spain v. St. Louis & S. F. R. Co.* (1907) 151 Fed. 522.

The statute had been pronounced void

In view of the enactment of the amended statute, noticed in the following section, the actual conclusion arrived at in this case is no longer of any practical interest, so far as regards the actual subject-matter involved. But the principle of construction upon which the court proceeded is one of living force and great importance. It may perhaps be enumerated thus: Where the persons designated as being within the purview of a statute are described by generic terms which on their face are applicable both to persons who belong to a class with reference to which the legislature is competent to make regulations, and also to persons who do not belong to such a class, a court cannot, for the purpose of upholding the statute, treat it as being applicable only to the former class, even though there may be a probability approaching to a reasonable certainty that the legislature intended that it should be of this limited scope. The full

in *Brooks v. Southern P. Co.* (1906) 148 Fed. 986.

³ The disagreement of Justices Moody, Harlan, and McKenna was based upon the ground that the act should not be construed as including intrastate commerce. Discussing the theory upon which the majority proceeded, *viz.*, that, as there was no qualification of or exception to the generality of the language descriptive of the employees or instrumentalities, it must be deemed to include those engaged and used solely in intrastate commerce, and even in manufacture, as well as those engaged and used in other commerce, Moody, J., said: "I venture to think that this argument rests upon too narrow ground. It contemplates merely the words of the statute; it shuts out the light which the Constitution sheds upon them; it overlooks the significance of the enumeration of the kinds of commerce clearly within the national control, and the omission of the commerce beyond that control,—an enumeration and omission which characterize, color, and restrain every word of the statute,—and it neglects the presumptions in favor of the validity of the law and of the obedience of Congress to the commands of the Constitution, which cannot with propriety be disregarded by this court. Taking into account these missing aids to construction, it becomes quite easy, quite reasonable, and, in my opinion, quite necessary, to construe the act as conferring its benefits only upon employees engaged in some fashion in the commerce which

is enumerated in it, and is undoubtedly under the control of Congress. Even without these guides for discovering the intent of Congress, which the uniform practice of the court compels us to use, it is natural to suppose that, when territorial, interstate, and foreign carriers only are mentioned, and every such carrier is declared to be liable 'to any of its employees,' only its employees in such commerce are intended. With those guides the conclusion appears to me irresistible; for they show that if the words, 'any of its employees,' in the context where they are used, are capable of meaning all of the employees upon any kind of work, yet their generality should be restrained so as to include only those who are subject to the power of the law-making body." Justice Holmes delivered a separate dissenting opinion, in which he took the position that the phrase "every common carrier engaged in trade and commerce" might be construed as meaning "while engaged in commerce." There can be no doubt that the words in question are grammatically susceptible of this interpretation. But with all deference to so distinguished an authority, it is submitted that the obvious sense of the words is, "every common carrier whose regular business is that of carrying on trade and commerce;" and that a court was consequently bound to assume, in the absence of other words indicative of a different conclusion, that this was the sense in which they were used by Congress.

effect of such a far-reaching principle remains to be seen. In a recent case it was relied upon as one of the steps in the argument of counsel, but the point so raised was evaded by the court.⁴

It was observed, *obliter*, by the court, that the act was not repugnant to the provisions in the 5th Amendment of the Federal Constitution which forbids the taking of property without due process of law.⁵ The same point was categorically ruled with respect to the act of 1908. See next section.

b. Validity in respect of the territories and the District of Columbia.—In a case decided subsequently to the one reviewed in the preceding subsection, it was explained that the general language used in the opinion delivered by the court was not to be understood as affirming the unconstitutionality of that part of the statute which defines the liability of carriers engaged in commerce in the territories and the District of Columbia.⁶

⁴ In *Chicago, I. & L. R. Co. v. Hackett* (1913) 228 U. S. 559, 57 L. ed. —, 33 Sup. Ct. Rep. 581, it was argued that the 14th Amendment of the Federal Constitution was violated by the Indiana employers' liability act, with regard to railroad employees, because upon its face it applies to "any employee," thereby embracing in one classification those employees subjected to the hazards incident to the actual operation of railway trains with those in other branches of the service, not so subjected, and therefore not within the reason for the classification. Upon this assumption it was insisted that the act was one which could not be upheld as valid as to one class of employees and invalid as to the other, embraced within the single classification, and must therefore be condemned as wholly invalid under the rule applied by this court in the *Howard Case*, *supra*. This contention was rejected solely for the reason that the supreme court of Indiana had construed the act as not extending to any class of railroad employees except those "whose occupation connects them in some way with the movement of trains, where they are exposed to the hazards incident to the operation and movement of trains and engines;" and that this construction was binding on a Federal court.

⁵ *Employers' Liability Cases (Howard v. Illinois C. R. Co.)* (1908) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141 (*obliter*).

⁶ *El Paso & N. E. R. Co. v. Gutierrez* (1909) 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21, affirming (1908) — Tex. Civ. App. —, 111 S. W. 159 (an action for an injury received in New Mexico). The court said: "In view of the plenary power of Congress under the Constitution over the territories of the United States, subject only to certain limitations and prohibitions not necessary to notice now, there can be no doubt that an act of Congress undertaking to regulate commerce in the District of Columbia and the territories of the United States would necessarily supersede the territorial law regulating the same subject. . . . A perusal of this portion of the opinion [in the *Howard Case*] makes it evident that it was not intended to hold the act unconstitutional in so far as it related to the District of Columbia and the territories, for it is there suggested that to interpolate in the act the qualifying words contended for would destroy the act in respect to the District of Columbia and the territories by limiting its operation in a field where Congress had plenary power, and did not depend for its authority upon the interstate commerce clause of the Constitution. . . . A perusal of the section makes it evident that Congress is here dealing first, with trade or commerce in the District of Columbia and the territories; and, second, with interstate commerce, commerce with foreign nations, and between the territories and the states. As we have already in-

2799.—Employers' liability act of 1908.—The effect of the curative statute which was enacted after the original one had been declared invalid is that every common carrier by railroad, while engaged in interstate commerce, shall "be liable in damages to any person suffering injury while he is employed by such carrier in such commerce," or in case of the death of such employee, 'resulting in whole or in part from the negligence of any of the officers, agents, or employees

dedicated, its power to deal with trade or commerce in the District of Columbia and the territories does not depend upon the authority of the interstate commerce clause of the Constitution. Upon the other hand, the regulation sought to be enacted as to commerce between the states and with foreign nations depends upon the authority of Congress, granted to it by the Constitution, to regulate commerce among the states and with foreign nations. As to the latter class, Congress was dealing with a liability ordinarily governed by state statutes, or controlled by the common law, as administered in the several states. The Federal power of regulation within the states is limited to the right of Congress to control transactions of interstate commerce; it has no authority to regulate commerce wholly of a domestic character. It was because Congress had exceeded its authority in attempting to regulate the second class of commerce named in the statute that this court was constrained to hold the act unconstitutional. The act undertook to fix the liability as to 'any employee,' whether engaged in interstate commerce or not, and, in the terms of the act, had so interwoven and blended the regulation of liability within the authority of Congress with that which was not that the whole act was held invalid in this respect. . . . Coming to consider the statute in the light of the accepted rules of construction, we are of opinion that the provisions with reference to interstate commerce, which were declared unconstitutional for the reasons stated, are entirely separable from and in nowise dependent upon the provisions of the act regulating commerce within the District of Columbia and the territories. Certainly these provisions could stand in separate acts, and the right to regulate one class of liability in nowise depends upon the other. Congress might have regulated the subject by laws applying alone to the terri-

tories, and left to the various states the regulation of the subject-matter within their borders, as had been the practice for many years. It remains to inquire whether it is plain that Congress would have enacted the legislation had the act been limited to the regulation of the liability to employees engaged in commerce within the District of Columbia and the territories. If we are satisfied that it would not, or that the matter is in such doubt that we are unable to say what Congress would have done, omitting the unconstitutional feature, then the statute must fall. *Illinois C. R. Co. v. McKendree* (1906) 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153; *Employers' Liability Cases*, *supra*. When we consider the purpose of Congress to regulate the liability of employer to employee, and its evident intention to change certain rules of the common law which theretofore prevailed as to the responsibility for negligence in the conduct of the business of transportation, we think that it is apparent that had Congress not undertaken to deal with this relation in the states where it had been regulated by local law, it would have dealt with the subject and enacted the curative provisions of the law applicable to the District of Columbia and the territories over which its plenary power gave it the undoubted right to pass a controlling law, and to make uniform regulations governing the subject."

For another case in which the validity of the statute with regard to territories was recognized, see *Atchison, T. & S. F. R. Co. v. Pickens* (1909) — Tex. Civ. App. —, 118 S. W. 1133.

The constitutionality of the act, so far as it related to the District of Columbia, was affirmed in *Hyde v. Southern R. Co.* (1908) 31 App. D. C. 466; *McNamara v. Washington Terminal Co.* (1910) 35 App. D. C. 230; *Philadelphia, B. & W. R. Co. v. Tucker* (1910) 35 App. D. C. 123.

of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment.' ”^{1a}

The validity of this act has been affirmed by the Federal Supreme Court.¹ In the case cited it was insisted in the first place that Congress had exceeded its power over interstate commerce by prescribing the particular regulations embodied in the act. The contentions unsuccessfully urged in support of this objection were as follows:

(1) That “the abrogation of the fellow-servant rule, the extension of the carrier’s liability to cases of death, and the restriction of the defenses of contributory negligence and assumption of risk, have no tendency to promote the safety of the employees, or to advance the commerce in which they are engaged.”²

^{1a} *St. Louis, I. M. & S. R. Co. v. Conley* (1911) 110 C. C. A. 97, 187 Fed. 949.

¹ *Second Employers’ Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) (1911) 223 U. S. 1. 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875. The constitutionality of the act was again affirmed in *Philadelphia, B. & W. R. Co. v. Schubert* (1912) 224 U. S. 603, 56 L. ed. 911, 32 Sup. Ct. Rep. 589, 1 N. C. C. A. 892.

The same position had previously been taken by one of the Federal courts of appeals (*St. Louis, I. M. & S. R. Co. v. Conley* [1911] 110 C. C. A. 97, 187 Fed. 949); and by the supreme court of Minnesota (*Owens v. Chicago G. W. R. Co.* [1910] 113 Minn. 49, 128 N. W. 1011).

The decision in *Hozie v. New York, N. H. & H. R. Co.* (1909) 82 Conn. 352, 73 Atl. 754, 17 Ann. Cas. 324, 21 Am. Neg. Cas. 42, declaring the act to be void, is not good law. It was the authority relied upon in one of the cases reversed by the Federal Supreme Court.

² Under this head, the court remarked: “Briefly stated, the departures from the common law made by the portions of the act against which the first objection is leveled are these: (a) The rule that the negligence of one employee, resulting in injury to another, was not to be attributed to their common employer, is displaced by a rule imposing upon the employer responsibility for such an injury, as was done at common law when the injured person was not an employee; (b) the rule exonerated

an employer from liability for injury sustained by an employee through the concurring negligence of the employer and the employee is abrogated in all instances where the employer’s violation of a statute enacted for the safety of his employees contributes to the injury, and in other instances is displaced by the rule of comparative negligence, whereby the exoneration is only from a proportional part of the damages, corresponding to the amount of negligence attributable to the employee; (c) the rule that an employee was deemed to assume the risk of injury, even if due to the employer’s negligence, where the employee voluntarily entered or remained in the service with an actual or presumed knowledge of the conditions out of which the risk arose, is abrogated in all instances where the employer’s violation of a statute enacted for the safety of his employees contributed to the injury; and (d) the rule denying a right of action for the death of one person, caused by the wrongful act or neglect of another, is displaced by a rule vesting such a right of action in the personal representatives of the deceased, for the benefit of designated relatives. Of the objection to these changes it is enough to observe: First. ‘A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule

(2) That "the liability imposed for injuries sustained by one employee through the negligence of another, although confined to instances where the injured employee is engaged in interstate commerce, is not confined to instances where both employees are so engaged."³

of conduct, may be changed at the will . . . of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.' *Munn v. Illinois* (1876) 94 U. S. 113, 134, 24 L. ed. 77, 87; *Martin v. Pittsburg & L. E. R. Co.* (1906) 203 U. S. 284, 294, 51 L. ed. 184, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87; *The Lottawanna* (*Rodd v. Heartt*) (1874) 21 Wall. 558, 577, 22 L. ed. 654, 662; *Western U. Teleg. Co. v. Commercial Mill. Co.* (1910) 218 U. S. 406, 417, 54 L. ed. 1088, 1091, 36 L.R.A.(N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815; Second. The natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; and, as whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged, we entertain no doubt that in making those changes Congress acted within the limits of the discretion confided to it by the Constitution. *Lottery Case* (*Champion v. Ames*) (1903) 188 U. S. 321, 353, 355, 47 L. ed. 492, 500, 501, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; *Atlantic Coast Line R. Co. v. Riverside Mills* (1911) 219 U. S. 186, 203, 55 L. ed. 167, 181, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164. We are not unmindful that that end was being measurably attained through the remedial legislation of the several states, but that legislation has been far from uniform, and it undoubtedly rested with Congress to determine whether a national law, operating uniformly in all the states, upon all carriers by railroad engaged in interstate commerce, would better subserve the needs of that commerce. *The Lottawanna* (*Rodd v. Heartt*) (1874) 21 Wall. 558, 581, 582, 22 L. ed. 654, 664; *Baltimore & O. R. Co. v. Baugh* (1893) 149 U. S. 368, 378–

379, 37 L. ed. 772, 777, 778, 13 Sup. Ct. Rep. 914."

³In this connection the court said: "The second objection proceeds upon the theory that, even although Congress has power to regulate the liability of a carrier for injuries sustained by one employee through the negligence of another, where all are engaged in interstate commerce, that power does not embrace instances where the negligent employee is engaged in intrastate commerce. But this is a mistaken theory, in that it treats the source of the injury rather than its effect upon interstate commerce, as the criterion of congressional power. As was said in *Southern R. Co. v. United States* (1911) 222 U. S. 20, 27, 56 L. ed. 72, 74, 32 Sup. Ct. Rep. 2, that power is plenary, and competently may be exerted to secure the safety of interstate transportation and of those who are employed therein, no matter what the source of the dangers which threaten it. The present act, unlike the one condemned in *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) (1908) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, deals only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employees while engaged in such commerce. And this being so, it is not a valid objection that the act embraces instances where the causal negligence is that of an employee engaged in intrastate commerce; for such negligence, when operating injuriously upon an employee engaged in interstate commerce, has the same effect upon that commerce as if the negligent employee were also engaged therein."

A similar conclusion has previously been reached by one of the inferior Federal Courts in *Watson v. St. Louis, I. M. & S. R. Co.* (1909) 169 Fed. 942. The following passage from the opinion may be quoted, as it deals with the question under an aspect and adverted to by the Supreme Court. "If Congress has the power to abolish the rule [i. e., as to the effect of coservice] so

(3) That "the act offends against the 5th Amendment to the Constitution (a) by unwarrantably interfering with the liberty of contract,⁴ and (b) by arbitrarily placing all employers engaged in inter-

far as it applies to master and servant when engaged in interstate commerce, then the employment of the servant whose wrong or negligence caused the injury is clearly immaterial, as the liability of the master by the repeal of that rule is imposed by the maxim of *respondeat superior*. Congress having, by the enactment of this statute, abolished the fellow-servant rule as to employees while engaged in interstate commerce, such servant, when so engaged to serve a master who is a carrier by rail, engaged in interstate transportation, does not undertake, as between himself and his employer, to assume the risk of negligence upon the part of a fellow servant. . . . If the contention of defendant is sustained, the effect would be that although the employee of a carrier by rail engaged in interstate transportation is injured while engaged on an interstate train, if the cause of the injury was the negligence of a fellow servant not engaged at the time in interstate work, Congress is powerless to provide for a recovery of compensation for the injuries suffered. Therefore, if an engineer or fireman on an interstate train is injured by reason of the negligence of a switchman or other employee of a train operated on a branch line, which is used exclusively for intrastate business, the failure of Congress to except such accidents from the provisions of the statute makes it unconstitutional, as being in excess of its powers under the Constitution. The same result would follow if a telegraph operator on such a branch line fails to transmit or deliver a message from the train dispatcher, directing the conductor of the interstate train to go on a siding for the purpose of letting an intrastate train pass on the main line, and by reason of such negligence there is a collision."

In *Zikos v. Oregon R. & Nav. Co.* (1910) 179 Fed. 893, where the facts involved did not render it necessary to decide the question, the court remarked that, "Its purpose to render a carrier engaged in interstate commerce liable to employees so engaged being apparent, the provisions are separable, whatever

be the rule regarding an injury resulting to an interstate employee from the negligence of an employee not so engaged."

⁴ With regard to this head of the objection the court said: "It suffices to say, in view of our recent decisions in *Chicago, B. & Q. R. Co. v. McGuire* (1911) 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; *Atlantic Coast Line R. Co. v. Riverside Mills* (1911) 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164, and *Baltimore & O. R. Co. v. Interstate Commerce Commission* (1911) 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621, that if Congress possesses the power to impose that liability, which we here hold that it does, it also possesses the power to insure its efficacy by prohibiting any contract, rule, regulation, or device in evasion of it."

This doctrine was again affirmed in *Philadelphia, B. & W. R. Co. v. Schubert* (1912) 224 U. S. 603, 56 L. ed. 911; (affirming (1911) 36 App. D. C. 565), 32 Sup. Ct. Rep. 589, 1 N. C. C. A. 892, where it was held that the provisions of § 5 were intended to apply as well to existing as to future contracts and regulations of the described character, and that the provisions, as thus construed, are not invalid. The court said: "The power of Congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the territories, to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the Federal authority to the continuing operation of previous contracts would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals, and to withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, Congress should be able to establish uni-

state commerce by railroad in a disfavored class, and all their employees engaged in such commerce in a favored class.”⁵

form rules, immediately obligatory, which, as to future action, should transcend all inconsistent provisions. Prior arrangements were necessarily subject to this paramount authority.”

In *McNamara v. Washington Terminal Co.* (1910) 35 App. D. C. 230, a similar doctrine was laid down with reference to the act of 1906 as applied to commerce in the District of Columbia.

⁵ Concerning the question of classification, the following remarks were made: “It is true that the liability which the act creates is imposed only on interstate carriers by railroad, although there are other interstate carriers, and is imposed for the benefit of all employees of such carriers by railroad who are employed in interstate commerce, although some are not subjected to the peculiar hazards incident to the operation of trains, or to hazards that differ from those to which other employees in such commerce, not within the act, are exposed. But it does not follow that this classification is violative of the ‘due process of law’ clause of the 5th Amendment. Even if it be assumed that that clause is equivalent to the ‘equal protection of the laws’ clause of the 14th Amendment, which is the most that can be claimed for it here, it does not take from Congress the power to classify, nor does it condemn exertions of that power merely because they occasion some inequalities. On the contrary, it admits of the exercise of a wide discretion in classifying according to general, rather than minute, distinctions, and condemns what is done only when it is without any reasonable basis, and therefore is purely arbitrary. *Lindsley v. Natural Carbonic Gas Co.* (1911) 220 U. S. 61, 78, 55 L. ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912 C, 160. Tested by these standards, this classification is not objectionable. Like classifications of railroad carriers and employees for like purposes, when assailed under the equal protection clause, have been sustained by repeated decisions of this court. *Missouri P. R. Co. v. Mackey* (1888) 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Louisville & N. R. Co. v. Melton* (1910) 218 U. S. 36, 54 L. ed. 921, — L.R.A.

(N.S.) —, 30 Sup. Ct. Rep. 676; *Mobile, J. & K. C. R. Co. v. Turnipseed* (1910) 219 U. S. 35, 55 L. ed. 78, 32 L.R.A. (N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912 A, 463.”

That the act does not violate the 5th Amendment had previously been laid down in *St. Louis, I. M. & S. R. Co. v. Conley* (1911) 110 C. C. A. 97, 187 Fed. 949, and *Watson v. St. Louis, I. M. & S. R. Co.* (1909) 169 Fed. 942. In the latter case the court said that “assuming the ‘due process’ clause of the 5th Amendment to be broad enough to include the ‘equal protection of the laws,’ and the latter phrase to be applicable in cases involving the interpretation of the former, the contentions put forward could not be sustained. It was pointed out that “in every instance in which state statutes abolishing or modifying the fellow-servant rule, and limiting the act to railroads only, as in the act now under consideration, have been attacked as being in violation of the ‘equal protection’ clause of the 14th Amendment, the Supreme Court of the United States has overruled the contention and sustained the validity of the acts, declaring that such classification by the legislative department is permissible, and not within the prohibition of that Amendment.”

In *Zikos v. Oregon R. & Nav. Co.* (1910) 179 Fed. 893, the act was sustained against the objections (1) that it denies the equal protection of the laws in respect of the carriers within its purview; and (2) that its effect is to establish in cases to which it applies rules of liability different from those which exist under the state laws in other cases arising from the relation of master and servant, and that it gives the right of recovery in case of the death of an employee to different parties.

The position taken by the Federal Supreme Court has destroyed the authority of some rulings made in *Howie v. New York, N. H. & H. R. Co.* (1909) 82 Conn. 352, 73 Atl. 754, 17 Ann. Cas. 324, 21 Am. Neg. Rep. 42, — viz., (1) that the provisions of § 3 of the act, which sanction a recovery where the injured employee was guilty of gross negligence and the railroad of none, are an arbitrary deprivation of property, prohibited by the 5th Amendment of the

Another point determined was, that the regulations of the act supersede the laws of the state in so far as the latter cover the same field.⁶

Lastly, it was laid down that "rights arising under those regulations may be enforced, as of right, in the courts of the state when their jurisdiction, as fixed by local laws, is adequate to the occasion."⁷

Federal Constitution; and (2) that the provisions of § 5, to the effect that every contract between an interstate railroad and an employee, exempting the railroad from liability created by the act, shall be void, violates that Amendment, because it deprives the parties to the contract of property without due process of the law.

⁶ In this connection the court relied upon the general principles laid down in *M'Culloch v. Maryland* (1819) 4 Wheat. 316, 4 L. ed. 579; viz., "that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective states, and cannot be controlled by them." As a particularly apposite repetition of that principle the following statement in *Smith v. Alabama* (1888) 124 U. S. 465, 473, 31 L. ed. 508, 510, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564, was quoted: "The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several states, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the states. It follows that any legislation of a state, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority." The court concluded thus: "Prior to the present act, the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employees while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the states, in the absence of action by Con-

gress. . . . The inaction of Congress however, in no wise affected its power over the subject. . . . And now that Congress has acted, the laws of the states, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is. *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) (1911) 233 U. S. 1, 55, 56 L. ed. 327, 348, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

⁷ The court after having mentioned the fact that the first of the cases before it had been decided by the supreme court of Connecticut, which had laid down a different doctrine, proceeded thus: "That, however, was not because the ordinary jurisdiction of the superior courts, as defined by the Constitution and laws of the state, was deemed inadequate, or not adapted to the adjudication of such a case, but because the supreme court of errors was of opinion (1) that the congressional act impliedly restricts the enforcement of the rights which it creates to the Federal courts, and (2) that, if this be not so, the superior courts are at liberty to decline cognizance of actions to enforce rights arising under that act, because (a) the policy manifested by it is not in accord with the policy of the state respecting the liability of employers to employees for injuries received by the latter while in the service of the former, and (b) it would be inconvenient and confusing for the same court, in dealing with cases of the same general class, to apply in some the standards of right established by the congressional act, and in others the different standards recognized by the laws of the state. We are quite unable to assent to the view that the enforcement of the rights which the congressional act creates was originally intended to be restricted to the Federal courts. . . . The sug-

2800. Enactments requiring safety appliances on railways.—The safety appliance act in its enlarged form, covering “all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, . . . and all other locomotives, tenders, cars, and similar vehicles used in connection therewith,” has been sustained by the Federal Supreme Court against the objection that it is not in terms confined to vehicles used in moving interstate traffic.¹ There seems to be some difficulty in reconciling on any broad

gestion that the act of Congress is not in harmony with the policy of the state, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exercise of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state. As was said by this court in *Clafin v. Houseman* (1876) 93 U. S. 130, 136, 137, 23 L. ed. 833, 838: “The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the several states, but is a concurrent and, within its jurisdiction, paramount, sovereignty. . . . The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the state as it is to recognize the state laws. The two together form one system of jurisprudence, which constitutes the law of the land for the state; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.” The Connecticut decision thus overruled is reported in 82 Conn. 373, 73 Atl. 762. It was based upon the earlier case of *Howie v. New York, N. H. & H. R. Co.* (1909) 82 Conn. 352, 73 Atl. 754, 17 Ann. Cas. 324, 21 Am. Neg. Rep. 42, in which the M. & S. Vol. VIII.—544.

whole subject underwent an elaborate discussion, which, with most, if not all of the various specific rulings made by the court, has been rendered obsolete by the remarks of the Federal Supreme Court.

It had previously been laid down by an inferior Federal court that the act does not attempt to delegate judicial power of the United States to state courts, in violation of article 3 of the Constitution, but creates substantive rights not solely cognizable in the Federal courts, but which may be availed of in any court of competent jurisdiction, state or Federal. *Zikos v. Oregon R. & Nav. Co.* (1910) 179 Fed. 893, 894 (Syll.)

¹*Southern R. Co. v. United States* (1911) 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2, affirming (1908) 164 Fed. 347 (act of March 2, 1903, chap. 976, 32 Stat. 943 [U. S. Comp. Stat. Supp. 1907, p. 885]). The court said: “The answer to this question depends upon another, which is, Is there a real or substantial relation or connection between what is required by these acts in respect of vehicles used in moving intrastate traffic, and the object which the acts obviously are designed to attain; namely, the safety of interstate commerce and of those who are employed in its movement? Or, stating it in another way, Is there such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intrastate as well as to those used in moving that which is interstate? If the answer to this question, as doubly stated, be in the affirmative, then the prin-

ground the position thus taken with the theory of construction on which the decision in the *Employers' Liability Cases* (see § 2798, *a*, *ante*), proceeded.² But the practical importance of the point has been greatly diminished by the circumstances that the statute con-

principal question must be answered in the same way. And this is so, not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary, and competently may be exerted to secure the safety of the persons and property transported therein, and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce. Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car, and when this is not the case, the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen, and like employees; for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not dependent in point of movement and safety, but are interdependent; for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains. And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train, but to others." In *Johnson v. Southern P. Co.* (1904) 196 U. S. 17, 49 L. ed. 369, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412, apparently the validity of the act was taken for granted. At all events it was not attacked by counsel.

The statute was upheld by inferior tribunals in *Wabash R. Co. v. United States* (1909) 93 C. C. A. 393, 168 Fed. 1; *Chicago, R. I. & P. R. Co. v.*

Brown (1911) 107 C. C. A. 300, 185 Fed. 80; *Southern R. Co. v. Snyder* (1911) 109 C. C. A. 344, 187 Fed. 492; *United States v. Wheeling & L. E. R. Co.* (1908) 167 Fed. 198; *United States v. Atlantic Coast Line R. Co.* (1907) 153 Fed. 918.

² The most elaborate attempt that has been made to effect a reconciliation is the following disquisition in *United States v. Wheeling & L. E. R. Co. supra*. "It is claimed that, since the act of 1903 undertakes to make the act of 1893 apply to trains, locomotives, and so forth, used on any railroad engaged in interstate commerce, it extends the operation of the act to subjects over which Congress has no control, and that this is exactly the effect of the decision of the Supreme Court in the *Employers' Liability Cases*. Many answers suggest themselves to this claim. If the act of 1903 had been incorporated in the original act of 1893, and if it be true that the scope which the act covered was larger than that which Congress had power to legislate upon, and in consequence of that the act should be held unconstitutional because of the impossibility of separation of the unconstitutional part from the constitutional part, still the contention of counsel would not be effective in this case. We have here the act of 1893 in full force and effect, with its provisions in no wise diminished or curtailed by the act of 1903. That act of 1903 is, as the Supreme Court of the United States declared in *Johnson v. Southern P. Co.* (1904) 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 12, affirmative and declaratory, and, in effect, only construes and applies the former act. Now, if the former act is construed and applied by a later act (which, of course, involves the proposition that it remains unrepealed), and the later act is unconstitutional, in that it undertakes to give the former act a wider application than Congress had power to give to it, by what sort of reasoning can it be contended that the former act falls to the ground because it has had plastered

strued in those cases has been amended in such a manner as to do away with the objection which was considered fatal to its validity.

It has also been held by one of the inferior courts that the act is not in conflict with the 10th Amendment to the Federal Constitution of the United States, which provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."³

upon it by Congress an unconstitutional construction and application? The mere statement of this proposition carries with it its answer and exhibits its unreasonableness. But much more may be said in favor of the propriety of this legislation, having in view the decision of the Supreme Court in the *Employers' Liability Cases*. It is true that the Supreme Court in that case held the employers' liability act (act June 11, 1906, chap. 3073, 34 Stat. at L. 232, U. S. Comp. Stat. Supp. 1911, p. 1316) unconstitutional because it made the railroad company liable to any of its employees, without restricting the liability to those who were engaged in interstate commerce; but a parity of reasoning would not require that we should say the same thing of the safety appliance act, because it refers to all cars used on any railroad engaged in interstate commerce. It seems to me that in the respect complained of there is no analogy between the decision of the Supreme Court in the *Employers' Liability Cases* and the theory of the defendant's counsel as to the constitutionality of the safety-appliance act. An employee of a railroad company engaged in interstate commerce does not, merely because he is such employee, sustain the same relation to interstate commerce as a car used on a railroad engaged in interstate commerce sustains to interstate commerce on that road. Certainly the Federal government owes no duty to, and has no authority over, an employee of a railroad which is engaged in interstate commerce, if the employee himself is not engaged in the work of interstate commerce. That employee is subject in respect to his relations with the railroad company to the laws of the state in which the service is performed. There is no reason why the power of the state should not be sufficient for his protection, or why the Federal government should inter-

fere with respect to that or any other matter relating to that employee in respect to his work with the railroad company, so long as it does not relate to the interstate commerce of the company. But this is not true of a car used by a railroad engaged in interstate commerce. All of the cars used by a railroad engaged in interstate commerce in the natural course of their use are instrumentalities of interstate commerce. Whether they carry interstate traffic themselves or are hauled in a train which contains interstate traffic, the effect is the same. They stand in a certain and important relation to that interstate commerce over which Congress has control; and it is quite apparent that Congress, in undertaking to determine the manner in which interstate commerce shall be carried on, and especially in making effective the useful and beneficent purpose of providing for the safety of employees, would necessarily have a regard for the cars which the interstate commerce railroad had in use. And thus, discovering a very marked and practical distinction between a car used by an interstate commerce railroad and a person in the employ of an interstate commerce railroad, we see how one in the nature of things becomes properly the subject of Federal legislation, while the other, depending upon the character of his work, may or may not become properly the subject of Federal legislation."

³ *United States v. Southern R. Co.* (1908) 164 Fed. 347. The court said: "The argument in support of this ground of demurrer is that the attempt of Congress to regulate the interstate highway in the manner set forth in the safety-appliance acts is an unconstitutional assumption by Congress of those powers which were reserved to the various states of the Union or to the people; that inasmuch as any proper construction of those acts must, of neces-

By the Supreme Court it has been laid down that the provision in the original act, referring it to the American Railway Association and the Interstate Commerce Commission to designate and promulgate the standard height and maximum variation of drawbars for freight cars, is not unconstitutional as a delegation of legislative power.⁴

2801. Enactments relating to labor organizations.—The enactment by which it was declared to be a criminal offense for an interstate carrier and any officer, agent, or receiver thereof, to require any employee or person seeking employment to enter into an agreement not to become a member of any labor organization, or to threaten any employee with loss of employment, or to discriminate unjustly against any employee because of his membership in such labor organization, has been held to be an invasion of the personal liberty, as well as the right of property, guaranteed by the 5th Amendment of the Federal Constitution.¹ It was also argued "that the authority to

sity, include the use of the highway for the purpose of carrying on commerce between the two points entirely within a state, this is an encroachment upon the reserved powers of the states to regulate their internal affairs, and was not conferred upon Congress by the Constitution. . . . It will thus be seen that by the very nature of things railroads between states are national in their character, and, when Congress determines to assume regulation thereof, its control must be, and is, exclusive and final. If Congress, therefore, under the power granted by the Constitution and under its police power, has a right to regulate the use of the interstate highway, surely that right cannot be impaired by any action of a state in conflict with the rules and regulations established by Congress. Uniformity of regulation affecting all the states is not only permissible, but is required. There must be only one system of rules applicable alike to the whole country, which Congress alone can prescribe. *Mobile County v. Kimball* (1880) 102 U. S. 691, 26 L. ed. 238. Interminable discord must of necessity prevail under our dual system of government if the power of Congress, once assumed, and the regulations prescribed by it, can be invaded by each and every state through which the great interstate highway runs. Within the field of congressional power, authorized by the Constitution of the

United States, the Federal power, to be effective at all, must be supreme in all parts of the United States." In the affirming judgment of the Supreme Court (see preceeding note) this phase of the subject was not adverted to.

⁴ *St. Louis, I. M. & S. R. Co. v. Taylor* (1908) 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616 (act of March 2, 1893).

¹ *Adair v. United States* (1908) 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764, reversing (1908) 152 Fed. 737 (act of June 1, 1898, chap. 370, § 10, 30 Stat. at L. 428 [U. S. Comp. Stat. 1901, p. 3211]). The court said: "Such liberty and right embraces the right to make contracts for the purchase of the labor of others, and equally the right to make contracts for the sale of one's own labor; each right, however, being subject to the fundamental condition that no contract, whatever its subject-matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests, or as hurtful to the public order, or as detrimental to the common good. This court has said that 'in every well-ordered society, charged with the duty of conserving the safety of its members, the rights of the individual in respect of this liberty may, at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by

make it a crime for an agent or officer of an interstate carrier, having authority in the premises from his principal, to discharge an employee from service to such carrier, simply because of his membership in a labor organization, can be re-

reasonable regulations, as the safety of the general public may demand.' *Jacobson v. Massachusetts* (1904) 197 U. S. 11, 29, 49 L. ed. 643, 651, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765, and authorities there cited. Without stopping to consider what would have been the rights of the railroad company under the 5th Amendment, had it been indicted under the act of Congress, it is sufficient in this case to say that, as agent of the railroad company, and, as such, responsible for the conduct of the business of one of its departments, it was the defendant Adair's right—and that right inhered in his personal liberty, and was also a right of property—to serve his employer as best he could, so long as he did nothing that was reasonably forbidden by law as injurious to the public interests. It was the right of the defendant to prescribe the terms upon which the services of Coppage would be accepted, and it was the right of Coppage to become or not, as he chose, an employee of the railroad company upon the terms offered to him. . . . While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least, in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. It was the legal right of the defendant Adair—

however unwise such a course might have been—to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so—however unwise such a course on his part might have been—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

The invalidity of the statute had previously been affirmed by inferior courts in *United States v. Scott* (1906) 148 Fed. 431, and *Order of R. R. Telegraphers v. Louisville & N. R. Co.* (1906) 148 Fed. 437. The following remarks made by Holmes, J., in his dissenting opinion, are worth quoting: "I confess that I think that the right to make contracts at will that has been derived from the word 'liberty' in the amendments has been stretched to its extreme by the decisions; but they agree that sometimes the right may be restrained. Where there is, or generally is believed to be, an important ground of public policy for restraint, the Constitution does not forbid it, whether this court agrees or disagrees with the policy pursued. It cannot be doubted that to prevent strikes, and, so far as possible, to foster its scheme of arbitration, might be deemed by Congress an important point of policy, and I think it impossible to say that Congress might not reasonably think that the provision in question would help a good deal to carry its policy along. But suppose the only effect really were to tend to bring about the complete unionizing of such railroad laborers as Congress can deal with,—I think that object alone would justify the act. I quite agree that the question what and how much good labor unions do is one on which intelligent people may differ,—I think that laboring men sometimes attribute to them

ferred to the power of Congress to regulate interstate commerce, without regard to any question of personal liberty or right of property arising under the 5th Amendment." But this contention did not prevail.²

advantages, as many attribute to combinations of capital disadvantages, that really are due to economic conditions of a far wider and deeper kind; but I could not pronounce it unwarranted if Congress should decide that to foster a strong union was for the best interest, not only of the men, but of the railroads and the country at large."

²The court reasoned thus: "Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the states, must have some real or substantial relation to or connection with the commerce regulated. But what possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce? Such relation to a labor organization cannot have *in itself* and in the eye of the law, any bearing upon the commerce with which the employee is connected by his labor and services. Labor associations, we assume, are organized for the general purpose of improving or bettering the conditions and conserving the interests of its members as wage-earners,—an object entirely legitimate and to be commended rather than condemned. But surely those associations as labor organizations have nothing to do with interstate commerce as such. One who engages in the service of an interstate carrier will, it must be assumed, faithfully perform his duty, whether he be a member or not a member of a labor organization. His fitness for the position in which he labors, and his diligence in the discharge of his duties, cannot in law or sound reason depend in any degree upon his being or not being a member of a labor organization. It cannot be assumed that his fitness is assured, or his diligence increased, by such membership, or that he is less fit or less diligent because of his not being a member of such an organization. It is the employee as a man, and not as a member of a labor organization, who labors in the service of an interstate carrier.

Will it be said that the provision in question had its origin in the apprehension on the part of Congress that if it did not show more consideration for members of labor organizations than for wage earners who were not members of such organizations, or if it did not insert in the statute some such provision as the one here in question, members of labor organizations would, by illegal or violent measures, interrupt or impair the freedom of commerce among the states? We will not indulge in any such conjectures, nor make them, in whole or in part, the basis of our decision. We could not do so consistently with the respect due to a co-ordinate department of the government. We could not do so without imputing to Congress the purpose to accord to one class of wage earners privileges withheld from another class of wage earners engaged, it may be, in the same kind of labor and serving the same employer. Nor will we assume, in our consideration of this case, that members of labor organizations will, in any considerable numbers, resort to illegal methods for accomplishing any particular object they have in view. Looking alone at the words of the statute for the purpose of ascertaining its scope and effect, and of determining its validity, we hold that there is no such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employee because of such membership on his part. If such a power exists in Congress it is difficult to perceive why it might not, by absolute regulation, require interstate carriers, under penalties, to employ in the conduct of its interstate business only members of labor organizations, or only those who are not members of such organizations,—a power which could not be recognized as existing under the Constitution of the United States. No such rule of criminal liability as that to which we have referred can be regarded as, in any just sense, a regulation of interstate commerce."

B. STATE ENACTMENTS.

2802. Generally.—The accepted doctrine is that, in respect of persons,—persons employed by carriers engaged in interstate commerce,—a general state enactment which purports to regulate the reciprocal obligations of masters and servants, and which does not affect such commerce except incidentally or indirectly,¹ remains valid as long as Congress abstains from occupying the same field of legislative action. After that occupation has been effected, the validity of the state enactment is determinable with reference to the rule that, “when a state

The enactment had previously been pronounced invalid by an inferior Federal court, on the grounds (1) that it was “not, in the constitutional sense, a regulation of commerce or of commercial intercourse among the states, and cannot justly nor fairly be so construed or treated, inasmuch as its essential object manifestly is only to regulate certain phases of the right of an employer to choose his own servants, whether the duties of those servants when employed shall relate to interstate commerce or not;” and (2) that it was “so broad as to be condemned by the rule laid down in the Trademark Cases.” *United States v. Scott* (1906) 148 Fed. 431, followed in *Order of R. R. Telegraphers v. Louisville & N. R. Co.* (1906) 148 Fed. 437.

¹“In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.” *Sherlock v. Alling* (1876) 93 U. S. 99, 103, 23 L. ed. 819, 820.

“While the laws of the states must yield to acts of Congress passed in execution of the powers conferred upon it by the Constitution, . . . the mere grant to Congress of the power to regulate commerce with foreign nations and among the states did not, of itself and without legislation by Congress, impair the authority of the states to establish such reasonable regulations as were appropriate for the protection of the

health, the lives, and the safety of their people.” *New York, N. H. & H. R. Co. v. New York* (1897) 165 U. S. 628, 631, 41 L. ed. 853, 854, 17 Sup. Ct. Rep. 418.

“The cases in which state legislation has been judicially condemned for interference with the commercial power of Congress have been cases where the interference was direct.” *New York C. & H. R. R. Co. v. Williams* (1910) 199 N. Y. 108, 123, 35 L.R.A.(N.S.) 549, 139 Am. St. Rep. 850, 92 N. E. 404.

“The mere fact that in some degree interstate commerce is affected by the act of a state legislature is not universally sufficient to condemn that act. The power of the state to control the conduct of individuals therein for the safety of the community is not taken away by the provision of the Federal Constitution above mentioned, merely because some fanciful or remote influence upon interstate commerce may result.” *State v. Chicago, M. & St. P. R. Co.* (1908) 136 Wis. 407, 411, 19 L.R.A.(N.S.) 326, 117 N. W. 686.

“The police power cannot be legitimately exercised by a state so as substantially to prohibit or unnecessarily burden either foreign or interstate commerce; but the interference, if any, in the exercise thereof, with the commercial power of the Federal government, in order to be unlawful, must be direct, and not the mere incidental effect of the enforcement of such power by the state. Even if it could be said that this statute, in its operation, affects interstate commerce only indirectly and remotely, it would nevertheless be a valid exercise by the state of its legislative power.” *Pittsburgh, C. C. & St. L. R. Co. v. State* (1909) 172 Ind. 147, 162, 87 N. E. 1034.

statute and a Federal statute operate upon the same subject-matter, and prescribe different rules concerning it, the state statute must give way." ²

It has now been definitely settled by a judgment of the Federal Supreme Court that where Congress declares that a statute in regard to a subject within its exclusive power shall not go into effect until a subsequent date, the states lose control of that subject during the intermediate period between the time when the statute is enacted and the time when it comes into active operation.³ This ruling destroys the authority of two decisions by state courts.⁴

² *Gulf, C. & S. F. R. Co. v. Hefley* (1895) 158 U. S. 99, 39 L. ed. 910, 15 Sup. Ct. Rep. 802.

"It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties, and liabilities of employees and others on railway trains engaged in that commerce; and that such legislation will supersede any state action on the subject." *Nashville, C. & St. L. R. Co. v. Alabama* (1888) 128 U. S. 96, 99, 32 L. ed. 352, 353, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28, 29.

"It is elementary, and such is the doctrine announced by the cases to which the court below referred, that the right of a state to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject, or manifests its purpose to call into play its exclusive power." *Northern P. R. Co. v. Washington* (1911) 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160.

³ *Northern P. R. Co. v. Washington* (1912) 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 169, reversing (1909) 53 Wash. 673, 102 Pac. 876, 17 Ann. Cas. 1013. In this case the enactment by Congress of the hours of service law, March 4, 1907, chap. 2939, 34 Stat. at L. 1415, U. S. Comp. Stat. Supp. 1911, p. 1321, was treated as a manifestation by Congress of its intent to bring the subject of hours of labor of employees of interstate carriers under its control; and although the act did not go into effect for a year after its passage, the various state laws on the subject were held to have become inoperative at once on the enactment. After referring to the gen-

eral rule as to the effect of an assertion of its power by Congress, the court continued thus: "To admit the fundamental principle, and yet to reason that because Congress chose to make its prohibitions take effect only after a year, the matter with which Congress dealt remained subject to state power, is to cause the act of Congress to destroy itself; that is, to give effect to the will of Congress as embodied in the postponing provision for the purpose of overriding and rendering ineffective the expression of the will of Congress to bring the subject within its control,—a manifestation arising from the mere fact of the enactment of the statute." The court approved the exposition of doctrine in the two cases cited below.

In *State v. Missouri P. R. Co.* (1908) 212 Mo. 658, 111 S. W. 500, the court argued thus: "We must construe the Federal act by reading into its dry letter its manifest spirit and purpose. Its dry letter reads that it shall not go into effect for one year. What was the meaning of, the object to be subserved by, that suspension of the operation of the law? What, except to preserve the equities of the situation by impliedly giving common carriers engaged in interstate commerce one year in which to get a supply of experienced telegraph and telephone operators and trainmen to carry on their business without interruption and hindrance, and otherwise adjust their business affairs to the shorter hours required by that act? When broadly judged, the Federal law must be construed as a notice (in the nature of a *caveat*) to all state legislatures, first, that Congress has occupied the ground by its statutory regulations; second, that in its high wisdom it has prescribed and marked out a

2803. Enactments relating to the payment of wages.—The contention that the provision in the New York labor law, which provides that railroad companies shall pay the wages of their employees twice a month, in cash, constitutes an interference with interstate commerce, has been rejected on the ground that "it is not in conflict with any legislation by Congress, nor does it affect interstate commerce directly. It relates to the wages of railway servants employed wholly within the state of New York, as well as to the wages of those whose duties take them from this state into others. The subject is one upon which Congress has not undertaken to act."¹

2804. Enactments limiting the hours of work.—The Missouri and Wisconsin statutes limiting the number of hours that telegraph operators on railways should be permitted to remain on duty were held, so far as work performed in relation to interstate traffic was concerned,

transition or preparatory period of one year (a sort of truce period). Now with such broad and wise purpose read into the Federal act, shall any state legislature thereafter sit in judgment upon the wisdom of such truce period and say, in effect: We deem it too long and too liberal? Shall it say, in effect: We see you have suspended your act for one whole year; we find by mathematical computation there is left six months or so which we may cover by a state law, and accordingly we shall pass a law giving shorter hours than yours, that will be good at least from June 14, 1907, until March 4, 1908? If the one law grants, by necessary implication, a breathing spell, shall the other take it away? If the one chalks out a policy, may the other rub it out?"

See also *State v. Texas & N. O. R. Co.* (1910) — Tex. Civ. App. —, 124 S. W. 984.

¹ In *People v. Erie R. Co.* (1910) 198 N. Y. 369, 29 L.R.A. (N.S.) 240, 139 Am. St. Rep. 828, 91 N. E. 849, 19 Ann. Cas. 811, the court argued thus: "The general rule is and necessarily must be that a statute does not become controlling until it actually becomes operative. And it readily will be seen how unfortunate and paralyzing might be the results of any contrary doctrine in this case. From the passage by both Congress and state legislatures of legislation on this subject of hours of employment, we must assume that it was a subject reasonably requiring legislative regu-

lation in the interest of the public. Congress, legislating for the entire country, might have deemed it wise, under all of the circumstances, to allow two or even three years within which all of the different employers affected by its statute might prepare to comply with the requirements thereof. If the theory of the respondent is correct, no state within that time, however urgent or pressing the necessity and demand for prompt action under special conditions prevailing within its borders, might pass any law which would cover even this interval, because general and average conditions throughout the country might be satisfied by such a statute becoming effective at some rather remote day in the future. I do not believe that such a result should be tolerated or adjudged under the facts of this case, even though it should be decided that there was a conflict between the Federal and the state legislation after the former became effective."

A similar position had previously been taken in *State v. Northern P. R. Co.* (1908) 36 Mont. 582, 15 L.R.A. (N.S.) 134, 93 Pac. 945, 13 Ann. Cas. 144.

¹ *New York C. & H. R. R. Co. v. Williams* (1910) 199 N. Y. 108, 35 L.R.A. (N.S.) 549, 139 Am. St. Rep. 850, 92 N. E. 404, affirming judgment [1909] 136 App. Div. 904, 120 N. Y. Supp. 1137, which affirmed [1909] 64 Misc. 15, 118 N. Y. Supp. 785.

to have been superseded by the Federal statute *in pari materia*.¹ It was also laid down that, as the state enactments did not discriminate between telegraph operators assisting in the operation of interstate commerce trains and traffic, and those similarly employed in the operation of local trains and traffic, and their provisions were not separable, this partial supersession necessarily involved the consequence that they must be entirely annulled.²

¹ For the provisions of these three enactments, see § 886, *ante*.

² In *State v. Missouri P. R. Co.* (1908) 212 Mo. 658, 111 S. W. 500, the court said: "Assuming for the moment that fairly, i. e., equitably, construed, in their true spirit and intent, both laws were in effect at the same time, then the question is: May the state law stand as legislation upon intrastate commerce alone? We think not. The exact question in another form was before the Supreme Court of the United States in two cases just decided (*Employers' Liability Cases* (*Howard v. Illinois C. R. Co.* and *Brooks v. Southern P. Co.*) (1908) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141). In those cases that court was construing a Federal fellow-servant act, so drawn as not to distinguish between interstate commerce and intrastate commerce. The cases proceeded on the theory that the Federal Congress might enact a fellow-servant act which was solely applicable to interstate commerce, but that an act so drawn as not to distinguish between the commercial power of Congress over interstate commerce and those strictly so engaged, and the power of the states to legislate upon intrastate commerce and those strictly engaged in that, could not stand. . . . An analytical examination of the act of 1907 shows that it does not discriminate between telegraph operators assisting in the operation of interstate commerce trains and traffic, and those similarly employed in local trains and traffic. It puts them all under the same blanket regulation, and neither does the indictment discriminate between the two. But one motive underlies this law. The provisions of the act are interdependent and not separable,—it must stand as a whole, as written, or fall as a whole."

In *State v. Chicago, M. & St. P. R. Co.* (1908) 136 Wis. 407, 19 L.R.A. (N.S.) 326, 117 N. W. 686, the court argued thus: "The safety of the public may be so imperiled by the employment

of incompetent or disabled persons in and about railroads, navigation, and the like, that the necessity for some legislation in regard thereto is manifest; and the forbearance of Congress to legislate might well be deemed significant of its policy to leave the subject of regulation to the legislatures of the several states. . . . We cannot doubt that prohibition of an overfatigued telegraph operator from directing the operation of trains falls within the state's power to control, even though thereby the conduct of interstate commerce might be impeded or burdened. But this power in the states is subject to that provision in the Constitution that Congress shall have power to regulate interstate commerce; that is, to prescribe the restrictions and limitations under which it shall be conducted; and when it prescribes those regulations, it does so to the exclusion of state legislation accomplishing a like regulation directly or indirectly, and whether intended for that purpose or not." The court then quoted the provisions of the Federal act, and proceeded thus: "This was a clear declaration by Congress of a will and policy that, so far as the regulation and safeguarding of interstate commerce might properly be affected by prescribing hours of labor for such employees, the subject should be under control of Congress, and not of the state legislatures. . . . It is too obvious to need more than statement that the legislation fixing nine and thirteen hours respectively, as the permitted term of employment, was declaration of a Federal policy on that subject, and that a state law excluding interstate railways from the use of their employees on interstate commerce for one of the nine hours or for five hours of the thirteen hours would be in direct conflict with that policy. The absence of such an employee at a small station upon an interstate road might well be a most serious inconvenience

Whether the circumstances that the number of hours specified in a given state enactment is smaller than that specified in the Federal enactment *in pari materia* produces such a repugnancy as requires the invalidation of the former is a question with regard to which the authorities are at variance, and which must be regarded as an open one until the Supreme Court of the United States has definitely settled it.³ The present writer ventures to express the opinion that

and burden upon both the celerity and safety of interstate commerce past that station, and requirement of such absence would be in direct antagonism to the policy of the Federal law permitting presence and employment. Not less obviously the act of Congress declared a policy that interstate railroads should have a reasonable time in which to adjust their business to the new restrictions, by postponing the date when the law should become operative for one year after its passage, thus indicating that such period of time was so necessary to reasonable convenience of interstate commerce. . . . Hence, a state provision to the effect that the time for such preparation and adjustment should be restricted to the 1st of January, 1908, as contained in chap. 575, Laws of 1907, is in direct conflict with the policy of Congress. *State v. Missouri P. R. Co.* (1908) 212 Mo. 658, 111 S. W. 500. We are therefore constrained to the conclusion that restriction of hours of labor of telegraph operators engaged in moving interstate trains or traffic is a field of legislation forbidden to the states by the Federal Constitution; but also that the limitation contained in our statute is in conflict with and in negation of the act of Congress, and cannot be enforced as to such employees. . . . The further contention is made by the respondent that, even if it be beyond the power of the state to restrict the services of an operator engaged in moving interstate trains, it is competent to so restrict as to one engaged exclusively upon trains or business wholly within the state, and that the law may be construed as so limited and its validity be sustained to that extent. The principle invoked is doubtless sound, if it is reasonably possible to separate the permissible from the forbidden, and to believe that the legislature intended by the act to affect the one and omit the other. On this subject the *Employers' Liability Cases* (*Howard v. Illinois C.*

R. Co.) (1908) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141 (see § 2798, *ante*), are entirely germane and controlling. It is there pointed out that by its terms that act is aimed simply at the employer, and makes no distinction in denunciation of his acts, whether they be done in interstate or intrastate business, so that it in terms regulates purely domestic acts and transactions. Chap. 575, Laws of 1907, is even more objectionable in this regard than the employers' liability act, for it in terms is directed to every corporation operating a line of railroad, in whole or in part, in the state of Wisconsin, thus expressly including those who are engaged in interstate commerce. But it is also open to the other objection, held to be fatal, that it restricts the employment of all operators, without discrimination as to the character of their services. This alone, under the reasoning of the *Employers' Liability Cases*, *supra*, must condemn the state act; for it is matter of common knowledge, and is set up as a fact by the answer, that any operator who works upon trains or transportation wholly within the state also necessarily and at the same time works upon interstate trains and transportation. *State v. Missouri P. R. Co.* (1908) 212 Mo. 658, 111 S. W. 500."

In *State v. Northern P. R. Co.* (1908) 36 Mont. 582, 15 L.R.A.(N.S.) 134, 93 Pac. 945, 13 Ann. Cas. 144, the court assumed that the state enactment under discussion would have been invalid, if the Federal one had actually been operative at the time when the alleged offense was committed. The only question actually discussed and decided was that a state legislature is competent to enact a valid law as to a railway engaged in interstate commerce.

³In *People v. Erie R. Co.* (1910) 198 N. Y. 369, 376, 29 L.R.A.(N.S.) 240, 139 Am. St. Rep. 828, 91 N. E. 849, 19 Ann. Cas. 811, reversing (1909) 135 App. Div. 767, 119 N. Y. Supp. 873, it

the New York court of appeals was warranted in holding in the case cited that the state enactment is not invalid under such circumstances.

was held that the legislature had power to enact § 7a of the labor law (now Consol. Laws, chap. 31, § 8) making it unlawful for an employee of a railroad engaged in moving interstate as well as intrastate commerce, who is in charge of one of its block signal towers, to be on duty more than eight hours in twenty-four, and imposing a fine for the violation thereof, and that "the Federal statute providing that such an employee shall not 'remain on duty for a longer period than nine hours in any twenty-four hour period' does not bar legislation by the state, limiting such employment to a lesser number of hours." After pointing out that the defense based upon the prior occupation by Congress of the given field of legislative action correctly assumed that the labor law purports to regulate the hours of the designated classes of employees, whether engaged in interstate or local traffic, and that its validity must accordingly be tested by the power of the state legislature over those engaged in the former description of traffic, the court continued: "Of course it is apparent that if the Federal statute saying that a signal tower operator may not work more than nine hours prevents a state from saying under controlling conditions that he may not work in excess of a lesser number of hours, state legislation of an analogous character on other subjects which readily suggest themselves, such as the proper weight of rails, the safe speed of trains, the necessary proportion of cars to be equipped with air brakes, may be prevented by Federal legislation simply prescribing the minimum rule of precaution, and the protection by the state of the safety of its citizens at least rendered more complicated and difficult. For unless there shall be in the future such a separation of interstate and local traffic as has not yet occurred, and which might be made extremely burdensome to the railroads, it will seldom happen that agencies employed in moving the former will not also be moving the latter; and therefore, if the state is prevented by a Federal statute like that before us from adopting additional but not conflicting requirements which it

deems to be necessary, it will be unable to insure the safety of local passengers and traffic. And it is obvious that a factor of safety like that in the present Federal statute, adapted, as we must assume, to average conditions prevailing throughout the country, often will be quite insufficient under the special conditions prevailing in a given state. . . . When we seek for authorities on the question whether the Federal statute is exclusive and preventive of the state statute, no decision by the Supreme Court of the United States is found rendered upon facts so similar to those here presented as to make it clearly and manifestly controlling. We are obliged to rely on general rules which have been laid down by that learned court from time to time in the consideration of questions of the same general class, and which do not seem to be always quite harmonious." After reviewing certain decisions, the court proceeded thus: "It would seem to me that within the authority of these cases and of what was said in deciding them as above quoted, it may be held that where Congress has prescribed a general minimum limit of safety applicable to average conditions throughout the country in the movement of interstate traffic, a state statute does not trespass upon forbidden territory and become obnoxious because, in response to special conditions prevailing within its limits, it has raised such limit of safety. There is no conflict; the state has simply supplemented the action of the Federal authorities. It is the same as if Congress had enacted that the classes of employees named might be employed for nine hours or less, and the state had then fixed the lesser number, which was left open by the Federal statute. The form of the latter fixing the outside limit, but not expressly legalizing employment up to that limit, fairly seems to have invited and to have left the subject open for supplemental state legislation if necessary. Such is the view which this court has taken on another occasion in the decision of a question quite identical with that here presented."

2805. Enactments prescribing the obligatory qualifications of employees.—It has been held that the “commerce clause” is not violated by state enactments which forbid locomotive engineers to operate engines without having previously passed qualifying examinations designed to test their general fitness in respect of skill and character,¹ and their ability to distinguish colors.²

2806. Enactments relating to the employment of aliens.—By § 2 of art. 19 of the Constitution of California, it was provided that no corporation formed under the laws of the state should, directly or indirectly, in any capacity, employ any Chinese or Mongolian, and that the legislature should pass such laws as might be necessary to enforce the provision. This provision, as well as the statute enacted for the purpose of enforcing it, was declared to be void, as being in conflict with articles 5 and 6 of the treaty of July 28, 1868, with China, which recognized the right of the citizens of that country to emigrate to the United States for purposes of curiosity, trade, and permanent residence, and provided that Chinese subjects residing in the United States should enjoy the same privileges, immunities and exemptions in respect to travel and residence as may be enjoyed by the citizens or subjects of the most favored nations. (16 Stat. at L. 740.) It was laid down that the privileges and immunities which, under the treaty, the Chinese are entitled to enjoy to the same extent as enjoyed by the subjects of the most favored nation, are all those rights which are fundamental, and belong to citizens of all free governments; and that among them is the right to labor, and to pursue any lawful employment in a lawful manner.¹

The rights assured to the Chinese under this treaty were also held

In *State v. Texas & N. O. R. Co.* (1910) — Tex. Civ. App. —, 124 S. W. 984, the invalidity of a Texas enactment which, like that of New York lessened the hours of labor, was affirmed.

The Missouri and Wisconsin cases reviewed in the preceding note are, upon the facts involved, inconsistent with the ruling of the New York court which refused to follow them. But it should be observed that the effect of the difference between the number of hours specified in the state and Federal enactments was not one of the points actually discussed in those cases.

¹ *Smith v. Alabama* (1887) 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564. The court remarked that such provision affects

interstate commerce only indirectly and incidentally.

² *Nashville, C. & St. L. R. Co. v. Alabama* (1888) 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; *McDonald v. State* (1886) 81 Ala. 279, 60 Am. Rep. 158, 2 So. 829. In *Louisville & N. R. Co. v. Baldwin* (1888) 85 Ala. 619, 622, 7 L.R.A. 266, 5 So. 311, it was said: “It is properly an act of legislation, within the scope of the admitted power reserved to the state, to regulate the relative rights and duties of persons being and acting within its territorial jurisdiction, intended to operate so as to secure for the public safety of person and property.”

¹ *Re Parrott* (1880) 6 Sawy. 349, 1 Fed. 481.

to have been infringed by an Oregon statute (Session Laws of 1872, p. 9) making it unlawful to employ Chinese upon street improvements or public works, except as a punishment for crime.²

2807. Enactments relating to occupation taxes.—It has been held that the Alabama statute providing that persons who solicit orders for pictures, picture frames, etc., who are not merchants or dealers having a permanent place of business within the state, etc., shall pay a license tax, constitutes an invalid restriction on interstate commerce in so far as it affects an agent of a foreign art company who delivered pictures, frames, etc., and collected the money due on orders previously taken by another agent of the corporation, and sent to another state, where the corporation resided, to be filled.¹

The validity of the Georgia enactment by which a license tax is imposed upon emigrant agents engaged in hiring laborers within the state for employment beyond its limits has been sustained against an objection that it is a regulation of interstate commerce.²

² *Baker v. Portland* (1879) 5 Sawy. 566, Fed. Cas. No. 777. Deady, J., said: "It will be observed that the treaty recognizes the right of the Chinese to change their home and allegiance, and to visit this country and become permanent residents thereof, and as such residents it guarantees to them all the privileges and immunities that may be enjoyed here by the citizens or subjects of any nation. Therefore, if the state can restrain and limit the Chinese in their labor and pursuits within its limits, it may do the same by the subjects of Great Britain, France, or Germany.

"True, this act does not undertake to exclude the Chinese from all kinds and fields of employment. But if the state, notwithstanding the treaty, may prevent the Chinese or the subjects of Great Britain from working upon street improvements and public works, it is not apparent why it may not prevent them from engaging in any kind of employment or working at any kind of labor.

"Nor can it be said with any show of reason or fairness that the treaty does not contemplate that the Chinese shall have the right to labor while in the United States. It impliedly recognizes their right to make this country their home, and expressly permits them to become permanent residents here; and this necessarily implies the right to live

and to labor for a living. It is difficult to conceive a grosser case of keeping the word of promise to the ear and breaking it to the hope than to invite Chinese to become permanent residents of this country upon a direct pledge that they shall enjoy all the privileges here of the most favored nation, and then to deliberately prevent them from earning a living, and thus make the proffered right of residence a mere mockery and deceit."

¹ *Ex parte Hull* (1907) 153 Fed. 459.

² *Williams v. Fears* (1900) 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128 (act of February 16, 1876). The court said: "Of course, transportation must eventually take place as the result of such contracts, but it does not follow that the emigrant agent was engaged in transportation, or that the tax on his occupation was levied on transportation." The following passage from the opinion in *Hooper v. California* (1895) 155 U. S. 648, 655, 39 L. ed. 297, 300, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207, was then adverted to as stating the real distinction on which the general rule and its exceptions are based: It "consists in the difference between interstate commerce or an instrumentality thereof, on the one side, and the mere incidents which may attend the carrying on of such commerce, on the other. This distinction has always been carefully observed, and is clearly defined by the authorities cited. If the power to

It has been declared that the South Dakota statute by which it is provided that any traveling salesman who solicits within the state orders for intoxicating liquors in quantities of less than 5 gallons, shall pay an annual license fee, cannot, in respect of interstate transactions, be regarded as repugnant to the Federal Constitution.³

The contention that the emigrant agents act of South Carolina is an interference with interstate commerce has been rejected on the ground that the business of hiring laborers and soliciting emigrants is not "article of commerce."⁴

The Georgia enactment by which a license tax is imposed upon the managing agents of foreign meat packing corporations has been pronounced valid in respect of the domestic business carried on by such agents, and no further.⁵

regulate interstate commerce applied to all the incidents to which said commerce might give rise, and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states; and would exclude state control over many contracts purely domestic in their nature." The court then observed: "The imposition of this tax falls within the distinction stated. These labor contracts were not in themselves subjects of traffic between the states, nor was the business of hiring laborers so immediately connected with interstate transportation or interstate traffic that it could be correctly said that those who followed it were engaged in interstate commerce, or that the tax on that occupation constituted a burden on such commerce." This statute had previously been held constitutional by the supreme court of Georgia in a case in which the point above discussed was not raised. *Shepperd v. Sumter County* (1877) 59 Ga. 535, 27 Am. Rep. 394.

³ *Delamater v. South Dakota* (1907) 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 Ann. Cas. 733, affirming (1905) 20 S. D. 23, 8 L.R.A.(N.S.) 774, 129 Am. St. Rep. 907, 104 N. W. 537. The *ratio decidendi* was that, as the highest court of South Dakota had held that the statute is a police regulation, and not a taxing act, it is within the purview of, and not in conflict with, the Wilson act. *Pabst Brewing Co. v. Crenshaw* (1905) 198 U. S. 17,

49 L. ed. 925, 25 Sup. Ct. Rep. 552, followed.

⁴ *State v. Napier* (1901) 63 S. C. 60, 41 S. E. 13.

⁵ *Kehrer v. Stewart* (1904) 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403, affirming (1903) 117 Ga. 969, 44 S. E. 854. The court said: "The record does not show what proportion of such business is interstate and what proportion is domestic, although it is conceded that most of the business is interstate in its character. If the amount of domestic business were purely nominal, as, for instance, if the consignee of a shipment made in Chicago upon an order filled there, refused the goods shipped, and the only way of disposing of them was by sales at Atlanta, this might be held to be strictly incidental to an interstate business, and in reality a part of it, as we held in *Crutcher v. Kentucky* (1891) 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; but if the agent carried on a definite, though a minor, part of his business in the state by the sales of meat there, he would not escape the payment of the tax, since the greater or less magnitude of the business cuts no figure in the imposition of the tax. There could be no doubt whatever that, if the agent carried on his interstate and domestic business in two distinct establishments, one would be subject and the other would not be subject to the tax, and in our view it makes no difference that the two branches of business are carried on in the same establishment. The burden of proof was clearly upon the plaintiff to show that the do-

2808. Enactments modifying the common-law liability of a master to his servants.—Prior to the time when Congress began to legislate with regard to employers' liability, the states were not debarred from enacting statutes for the protection of railway employees engaged in interstate commerce.¹ It was on this ground that several statutes abrogating or modifying the doctrine of common employment were sustained.² The states are now precluded from entering that portion of the legislative domain which has been appropriated by the Federal enactments.³ But in respect of the residue of that domain, they are still entitled to pass protective laws. In this point of view the courts have affirmed the validity of statutes which prescribed the number of employees to be carried on trains within the state in question;⁴ of

mestic business was a mere incident to the interstate business."

¹ *Missouri P. R. Co. v. Castle* (1912) 224 U. S. 541, 56 L. ed. 875, 32 Sup. Ct. Rep. 606 [affirming [1909] 97 C. C. A. 124, 172 Fed. 841]. The court cited *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) (1912) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; *Missouri P. R. Co. v. Castle*, *ubi supra*, note.

² In *Peirce v. Van Dusen* (1897) 69 L.R.A. 705, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693, it was held that an Ohio statute modifying the fellow-servant rule with respect to employees of railway companies was valid, as applied to a railroad company engaged in interstate commerce.

"That the states have the right to regulate the relations between employers and employees within their borders, and to fix the liability of the former for the acts and negligence of the latter," was laid down in *Southern P. Co. v. Schoer* (1902) 57 L.R.A. 707, 52 C. C. A. 263, 114 Fed. 466 (Utah act).

See also *McGuire v. Chicago, B. & Q. R. Co.* (1906) 131 Iowa, 340, 33 L.R.A. (N.S.) 706, 108 N. W. 902; *Schradin v. New York C. & H. R. R. Co.* (1908) 124 App. Div. 705, 109 N. Y. Supp. 428, affirming (1907) 103 N. Y. Supp. 73; *Missouri, K. & T. R. Co. v. Nelson* (1905) 39 Tex. Civ. App. 269, 87 S. W. 706.

In *Martin v. Pittsburg & L. E. R. Co.* (1906) 203 U. S. 284, 51 L. ed. 184, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87 [affirming [1905] 72 Ohio St. 659, 76 N. E. 1129], the Pennsylvania act of April 4,

1868 (now repealed), under which certain classes of persons working in or about a railroad has only the same remedial rights, in the event of their being injured, as employees of the railroad companies, was held not to be in conflict with the commerce clause.

³ In *Fulgham v. Midland Valley R. Co.* (1909) 167 Fed. 660, Rogers, J., observed with regard to the Federal employers' liability act of 1908: "It covers not only injuries sustained by employees engaged in that [interstate] commerce, resulting from the negligence of the master and his servants, and from defects in the designated instrumentalities in use in that commerce, but also dealt with contributory and comparative negligence and assumed risk, making, in certain cases, at least, the master an insurer of the safety of the servant while in his employment in that commerce. It covers and overlaps the whole state legislation, and is therefore exclusive." For another decision to the same effect, see *Dewberry v. Southern R. Co.* (1910) 175 Fed. 307.

⁴ In *Chicago, R. I. & P. R. Co. v. Arkansas* (1911) 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275 [affirming [1908] 86 Ark. 412, 111 S. W. 456], the Arkansas act, prescribing the minimum of employees that must be carried on every freight train, was upheld. The court said: "It is not too much to say that the state was under an obligation to establish such regulations as were necessary or reasonable for the safety of all engaged in business or domiciled within its limits. Beyond doubt, passengers on interstate carriers while within Arkansas are as fully entitled to the

benefits of valid local laws enacted for the public safety as are citizens of the state. Local statutes directed to such an end have their source in the power of the state, never surrendered, of caring for the public safety of all within its jurisdiction; and the validity under the Constitution of the United States of such statutes is not to be questioned in a Federal court unless they are clearly inconsistent with some power granted to the general government, or with some right secured by that instrument, or unless they are purely arbitrary in their nature. The statute here involved is not in any proper sense a regulation of interstate commerce, nor does it deny the equal protection of the laws. Upon its face, it must be taken as not directed against interstate commerce, but as having been enacted in aid, not in obstruction, of such commerce, and for the protection of those engaged in such commerce. Under the evidence, there is admittedly some room for controversy as to whether the statute is or was necessary; but it cannot be said that it is so unreasonable as to justify the court in adjudging that it is merely an arbitrary exercise of power, and not germane to the objects which evidently the state legislature had in view. It is a means employed by the state to accomplish an object which it is entitled to accomplish, and such means, even if deemed unwise, are not to be condemned or disregarded by the courts if they have a real relation to that object. And the statute being applicable alike to all belonging to the same class, there is no basis for the contention that there has been a denial of the equal protection of the laws. Undoubtedly, Congress, in its discretion, may take entire charge of the whole subject of the equipment of interstate cars, and establish such regulations as are necessary and proper for the protection of those engaged in interstate commerce. But it has not done so in respect of the number of employees to whom may be committed to the actual management of interstate trains of any kind."

In *Pittsburgh, C. C. & St. L. R. Co. v. State* (1909) 172 Ind. 147, 87 N. E. 1034, the court thus discussed the enactment in Ind. Sess. Laws 1907, chap. 11: "As the statute presents itself to us, there appears to be no room for asserting that it cannot be so construed as to apply only to intrastate trains. In

fact, it may be asserted that the act only professes to apply to and control railroad companies doing business within the state of Indiana, operating over their roads the trains designated. We cannot assume that the legislature, in passing this law, intended to exceed its power, but, on the contrary, we must presume that the legislative department knew when it enacted the statute that its provisions could not be extended so as to have any force or effect beyond the limits of this state. The act was passed by the legislature under the police power of the state, and we discover nothing in its provisions which can be said to afford grounds for an argument that it is an attempt on the part of the state, through its legislature, to regulate interstate commerce. It contains no restrictions in respect to persons or things which are carried by the trains in question; no regulations of fares or freights to be exacted by the railroad companies; in fact, its object, as the title discloses, is 'to better protect the lives of railway employees and the traveling public.' . . . There are many cases, as the authorities affirm, where the police power of the state can be properly exercised to insure a faithful and prompt performance of duty, within the limits of the state, upon the part of railroad companies, or other common carriers engaged in interstate commerce. This is especially true in respect to laws enacted by the state for the safety of persons and property. Such regulations are rather to be regarded as legislation in aid of commerce, and are generally considered with special favor by the courts. *Chicago, M. & St. P. R. Co. v. Solan* (1898) 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; *Missouri, K. & T. R. Co. v. Huber* (1898) 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488. . . . "The contention of appellant's counsel is that, by the passage of this statute, the state has entered a class over which Congress has the exclusive power to legislate; therefore they argue that the silence of Congress, or the nonexercise of its power, alone prohibits the state from entering and legislating in respect to matters embraced within such class. From the viewpoint of appellant's counsel the claim in respect to the nonaction of Congress is true and a well-settled proposition. *Covington & C. Bridge Co. v. Kentucky* (1894) 154 U. S.

a statute requiring carriers to use automatic couplers on locomotives or cars in moving state traffic;⁵ of a statute requiring all railroads engaged in intrastate commerce to equip their cars with safety appliances;⁶ of a statute requiring frogs on railroad to be blocked;⁷

204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; *Gulf, C. & S. F. R. Co. v. Hefley* (1895) 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Judson, *Interstate Commerce*, §§ 22, 23. . . . But the act here in controversy is confined to the state in its operation, and may be permitted to stand until Congress sees fit to enter the field and actually legislate upon the precise subject-matter, in which event the statute in question would have to yield. It more properly belongs to a class in which the power of the state to legislate in respect thereto is concurrent with the Federal government; or, in other words, to a class into which either the state or the Federal government has authority to enter and legislate upon the precise subject-matter, but where the act of the state, in case of actual legislation by Congress, would be compelled to yield to such Federal legislation, in case of a direct conflict between the two acts. . . . The nonaction of Congress in respect to the legislation upon the precise subject-matter of the statute in this case may be regarded as the equivalent of the declaration by that body that, until it sees proper to legislate thereon, the matter may be regulated by the authority of the state." The Federal statutes which, according to defendant's contention, evinced the intention of Congress to occupy the same field as the state enactment under review, were the following: The safety-appliance act (see § 1878, *ante*), the act of June 1, 1898, chap. 370, 30 Stat. at L. 424, U. S. Comp. Stat. 1901, p. 3205, relating to the adjustment of controversies between railroad companies engaged in interstate commerce and their employees; the act of March 3, 1901, chap. 866, 31 Stat. at L. 1446, U. S. Comp. Stat. 1901, p. 3176, requiring reports of accidents to the Interstate Commerce Commission; the act of March 4, 1907, chap. 2939, 34 Stat. at L. 1415, U. S. Comp. Stat. Supp. 1911, p. 1321, limiting the orders of service of employees; and the Hepburn act of June 29, 1906, chap. 3591, 34 Stat. at L. 584, U. S. Comp. Stat. Supp. 1911, p. 1288, relat-

ing to reports of employees and salaries, etc. The court pointed out that the argument founded on the existence of these statutes had been already rejected by the Supreme Court of the United States in *Gulf, C. & S. F. R. Co. v. Hefley* (1895) 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; *Missouri, K. & T. R. Co. v. Haber* (1898) 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488.

⁵ *Detroit, T. & I. R. Co. v. State* (1910) 82 Ohio St. 60, 137 Am. St. Rep. 758, 91 N. E. 869. The court said: "Our statute does not conflict with the Federal statute in the character of the coupler required, but requires the same kind of coupler, and was passed to promote the same object, though under a different power; and while no doubt it was enacted to apply to cases assumed not to be covered by the Federal statute, it is not unreasonable, and is not void merely because a failure to equip the car with automatic couplers would subject the railroad company to punishment under a state statute as well as under the act of Congress. 'The same act or series of acts may constitute an offense equally against the United States and the state, subjecting the guilty party to punishment under the laws of each government.' *Cross v. North Carolina* (1889) 132 U. S. 131, 33 L. ed. 287, 10 Sup. Ct. Rep. 47. The regulation of commerce among the states is within the exclusive jurisdiction of Congress, but it is well settled that a state statute, enacted in the exercise of its police power, not regulating or directly affecting interstate commerce, or in conflict with Federal regulations, but merely regulative of the instrumentalities of commerce, is not void; and when such state regulations do conflict with Federal regulations, they are not void on the ground that the state has exercised a power exclusively in Congress, but because the Constitution and the laws of the United States, made in pursuance thereof, are the supreme law of the land."

⁶ *Luken v. Lake Shore & M. S. R. Co.* (1911) 248 Ill. 377, 385, 140 Am. St. Rep. 220, 94 N. E. 175, 20 Ann. Cas. 82,.

of a statute directing guard and guard posts to be placed on railroad bridges and trestles and the approaches thereto;⁸ and of a statute providing that the sale and delivery of black powder for use in coal mines shall not be made otherwise than in original packages.⁹

As applied to a railroad postal clerk, the Pennsylvania statute (now repealed), by which certain classes of persons were, in respect of their right to recover for injuries received in and about a railroad, placed upon the same footing as employees of the railroad company, was not in conflict with the power of Congress to establish postoffices and post roads.¹⁰ Nor is the authority of Congress in that regard infringed by the Indiana statute prescribing the number of employees to be carried on trains operated through the state.¹¹

In one case it was held that the circumstance that the state enactment under review covered acts of negligence of railroad companies in respect to their cars, roadbed, machinery, etc., subjects dealt with

affirming (1910) 154 Ill. App. 550. The court said: "All powers not delegated to the Federal government by the Constitution are reserved to the states, and the states have full power over commerce which does not assume the character of interstate commerce, and may pass such laws regulating commerce within the states as they may deem expedient or politic. If the places from which and to which passengers and property are carried, and the line over which they are carried, are within the state, then the commerce is domestic and is subject to state control. The transportation of property between points within a state by a railroad engaged in interstate traffic does not, of itself, determine the character of the traffic and make it interstate commerce. It is not the character of the road by which property is transported, but the character of the traffic, that determines whether or not it is interstate or intrastate commerce. . . . The fact that some roads may be engaged in both interstate and intrastate commerce does not prevent the state from adopting such regulations as it may deem proper to provide for the safety of men engaged in carrying on intrastate commerce, if such regulations are not inconsistent with or repugnant to the acts of Congress adopted for the regulation of railroads engaged in interstate commerce."

⁷ *St. Louis, I. M. & S. R. Co. v. Mc-Namare* (1909) 91 Ark. 515, 122 S. W. 102.

⁸ *New York, N. H. & H. R. Co. v. New York* (1896) 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418. (Laws of 1887, chap. 616, Laws of 1888, chap. 189). The court said: So far as the act "may affect interstate commerce, it is to be regarded as legislation in aid of commerce, and enacted under the power remaining with the state to regulate the relative rights and duties of all persons and corporations within its limits. Until displaced by such national legislation as Congress may rightfully establish under its power to regulate commerce with foreign nations and among the several states, the validity of the statute, so far as the commerce clause of the Constitution of the United States is concerned, cannot be questioned." The enactment discussed was a general one, passed, so far as appears, mainly, if not entirely, for the protection of passengers.

⁹ *Re Williams* (1908) 79 Kan. 212, 98 Pac. 777 (Kan. Laws 1907, chap. 250). The court said: "The control of interstate commerce, committed to Congress, does not prevent the state from making reasonable regulations designed primarily to promote the health and safety of its people, although they indirectly affect the subject of interstate commerce."

¹⁰ *Martin v. Pittsburg & L. E. R. Co.* (1906) 203 U. S. 292, 51 L. ed. 184, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87.

¹¹ *Pittsburgh, C. C. & St. L. R. Co. v. State* (1909) 172 Ind. 147, 87 N. E. 1034.

by the Federal safety-appliance act, did not afford any substantial ground for the contention that the statute was invalid, in so far as it imposed liability for an injury to an employee arising from the negligence of a coemployee.¹²

2809. Enactments relating to seamen.—A provision in the Penal Code of Georgia (§ 655), which declares that, "if any person shall aid an article seaman or apprentice to desert or leave his vessel while in the waters of this state, he shall be punished as for a misdemeanor," has been held to be constitutional, on the ground that, although the subject was one for the cognizance of Congress, yet, since that body had failed to legislate with reference to it, the state legislature was competent to control and regulate the matter.¹

2810. Enactments relating to pilots.—The extent to which the pilotage regulations in the Georgia Code have been annulled by the general enactments of Congress upon the same subject is discussed in the case cited below.¹

2811. Sunday laws.—It has been held that the Georgia statute by which it is declared unlawful to run a freight train on any railroad in the state on the Sabbath Day is not an infringement of the "commerce clause."¹

¹² *Missouri P. R. Co. v. Castle* (1912) 224 U. S. 541, 56 L. ed. 875, 32 Sup. Ct. Rep. 606.

¹ *Handel v. Chaplin* (1900) 111 Ga. 800, 51 L.R.A. 720, 36 S. E. 979. Referring to the contention that the statute was an attempt to regulate commerce, the court laid it down that, "where the subject is local, and not national, in its nature, and does not require a uniform system of regulation, then, in the absence of legislation on it by Congress, it may be regulated by the state."

¹ *Thompson v. Sprague* (1882) 69 Ga. 409, 47 Am. Rep. 760.

¹ *Hennington v. State* (1896) 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086, affirming (1892) 90 Ga. 396, 4 Inters. Com. Rep. 413, 17 S. E. 1009. The court said: "These authorities make it clear that the legislative enactments of the states, passed under their admitted police powers, and having a real relation to the domestic peace, order, health, and safety of their people, but which, by their necessary operation, affect to some extent, or for a limited time, the conduct of commerce among the states, are yet not invalid by force

alone of the grant of power to Congress to regulate such commerce, and, if not obnoxious to some other constitutional provision, or destructive of some right secured by the fundamental law, are to be respected in the courts of the Union until they are superseded and displaced by some act of Congress passed in execution of the power granted to it by the Constitution. Local laws of the character mentioned have their source in the powers which the states reserved and never surrendered to Congress, of providing for the public health, the public morals, and the public safety, and are not, within the meaning of the Constitution, and considered in their own nature, regulations of interstate commerce simply because, for a limited time or to a limited extent, they cover the field occupied by those engaged in such commerce. The statute of Georgia is not directed against interstate commerce. It establishes a rule of civil conduct applicable alike to all freight trains, domestic as well as interstate. It applies to the transportation of interstate freight the same rule precisely that it applies to the transportation of domestic freight. And it places the busi-

PART II.

SUBJECT CONSIDERED WITH REFERENCE TO CONSTITUTIONAL PROVISIONS DESIGNED FOR THE PROTECTION OF PERSON AND PROPERTY.

2812. Introductory.—In the following sections it is proposed to discuss the extent of the judicial power with regard to the annulment of statutes on the ground of their being repugnant to one or another of those provisions of the American Federal and State Constitutions which are designed for the protection of person and property.

The validity of many of the enactments referred to has also been considered with reference to the clauses inserted in most, if not all, the organic laws of the states, to the effect that statutes shall not embrace more than one subject, which shall be clearly expressed in the title. The cases decided in this point of view are collected in the footnote.¹

ness of transporting freight in the same category as all other secular business. It simply declares that, on and during the day fixed by law as a day of rest for all the people within the limits of the state from toil and labor incident to their callings, the transportation of freight shall be suspended. We are of opinion that such a law, although in a limited degree affecting interstate commerce, is not for that reason a needless intrusion upon the domain of Federal jurisdiction, nor strictly a regulation of interstate commerce, but, considered in its own nature, is an ordinary police regulation, designed to secure the well being and to promote the general welfare of the people within the state by which it was established, and therefore not invalid by force alone of the Constitution of the United States. The judgment is affirmed."

¹ (a) *Lien for wages.*—The words of the title of the Tennessee mechanics' lien law, *viz.*, "An Act to Amend the Mechanics' Lien Law, and to Afford Mechanics and Materialmen Greater Security for Their Work and Material," have been held to be sufficient to cover all the provisions in the body of the statute. *Cole Mfg. Co. v. Falls* (1891) 90 Tenn. 466, 16 S. W. 1045.

The title of the Colorado mechanics' lien act (Sess. Laws 1893, chap. 117), which is, "An Act to Secure Liens to

Mechanics and Others," is sufficient to embrace the provisions granting liens to other persons than mechanics, and the act contains but one subject. *Chicago Lumber Co. v. Newcomb* (1903) 19 Colo. App. 265, 74 Pac. 786.

The title of a California enactment is, "An Act to Add a New Section to the Code of Civil Procedure of the State of California, to be Numbered Section 1203, Relating to Liens of Mechanics and Others." The new section is the last of a chapter in the Code dealing with mechanics' liens, and in terms it refers to mechanics' liens, and provides a security for claims in addition to such liens. Held, that, under the liberal construction which had previously been placed upon the said provision of the Constitution which relates to titles, this title must be held to be sufficient. *Carpenter v. Furrey* (1900) 128 Cal. 665, 61 Pac. 369.

The Virginia act of March 21, 1877, amended April 2, 1879, entitled, "An Act to Secure Payment of Wages and Salaries of Certain Employees of Railway and Other Transportation Companies," provides that employees and persons furnishing to such companies supplies, cars, and engines shall have a prior lien upon the property of such companies. Held, that, as to the cars and engines, the statute was void. *Fidelity Ins. Trust & S. D. Co. v.*

Shenandoah Valley R. Co. (1889) 86 Va. 1, 19 Am. St. Rep. 858, 9 S. E. 759, followed in *Fidelity Ins. S. D. Co. v. Shenandoah Iron Co.* (1889) 42 Fed. 376, and *M. A. Furbush & Son Mach. Co. v. Liberty Woolen Mills* (1896) 81 Fed. 425.

The Virginia act of March 21, 1877, was entitled, "An Act to Secure the Payment of Wages or Salaries to Certain Employees of Railway, Canal, Steamboat, and Other Corporations," while the act itself referred only to railroad, canal, or "other transportation companies." Held, that, if the words "other corporations" were construed to mean corporations of every class, the title would not express the object of the act, and it would be obnoxious to article 5, § 15, of the state Constitution. Held, further, that, to save the act, the words "other corporations" must be construed to mean those of the same class as the ones enumerated. *Crowther v. Fidelity Ins. Trust & S. D. Co.* (1898) 29 C. C. A. 1, 42 U. S. App. 701, 85 Fed. 41. The same doctrine had previously been laid down in *Fidelity Ins. & S. D. Co. v. Shenandoah Iron Co.* (1889) 42 Fed. 376.

The title of this Virginia act, in its original form, referred only to "wages or salaries," but the body of it related also to supplies necessary for the operation of the corporations named. The act of April 2, 1879, while entitled, "An Act to Amend and Re-enact" that act of 1877, included also mining and manufacturing corporations. Held, that both acts must be controlled by the title of the first, and that the second act, in so far as it related to supplies, and to corporations other than transportation corporations, was unconstitutional. To the same effect, see *Fidelity Ins. & S. D. Co. v. Shenandoah Iron Co.* (1889) 42 Fed. 372.

The Washington act of 1893, p. 32, § 1 (Pierce's Code, § 6102), which is entitled, "An Act Providing for the Enforcement of Liens," but makes no mention of any provision relating to bonds of contractors, imposes liens for labor upon specified classes of property, with a proviso to the effect that railroad companies letting work to contractors shall take a bond for the protection of laborers and materialmen, and in the case of failure so to do, the company shall be liable to the full extent of such debts contracted by such contractor.

Discussing the contention of the appellant railway company, that the statute meant that when a railroad company had contracted with any person for the construction of its road, and had failed to take a bond conditioned that such persons shall pay all laborers, then an action should lie directly against the railroad company, and that no notices of liens are necessary, the court said: "The title of the act is, however, confined to the enforcement of liens, which subject relates solely to a remedy against specific property; and if the act shall be construed as adding a cumulative remedy by way of creating a distinct personal liability against the railroad company itself, and independent of any lien feature, it may well be contended that such a subject is distinct from that mentioned in the title, and that it is not comprehended therein. In that event, the provisions with regard to the taking of the bond, and resulting liability for failure to take it, would have to be excluded from the operation of the statute. It must, however, be presumed that it was the legislative view that those provisions may be effective without doing violence to the Constitution, and it is our duty to adopt such a view if it can be discovered. . . . It will be observed that, following the semicolon after the word 'agent' it is provided that 'every contractor . . . shall be held to be the agent of the owner, for the purposes of the establishment of the lien created by this act.' So far the section is complete. It has provided for a lien, and has declared who shall be agents for the purposes of the lien. Now follows what is designated as a proviso, wherein it is stated that when a railroad company shall contract with any person for the construction of its road, it shall take from such person a bond conditioned to pay laborers and materialmen. The bond is made security for what the prior portion of the section has said shall be lienable against the railroad property. We think the proviso was intended as an exception, and that the section after the semicolon should be liberally read, to the effect that every contractor shall be held to be the agent of the owner for the purposes of the lien, except that, in the case of railroad companies, the contractor's bond for the security of laborers and materialmen shall dispense with such agency for the purposes of the lien, and

shall take the place of the lien. In other words, it seems to us clear that it was intended to relieve railroad property from the burden of the lien if a good and sufficient bond is provided for the security of the labor and material; but that, if such bond is not provided, then railroad property, like all other classes of property named in the act, must be subject to the establishment and enforcement of the lien. The failure to take the bond not only subjects the property to the lien, but the railroad company is also made personally liable in connection with the enforcement of the lien; so that a personal judgment may be had against it as an additional security, if the lien shall prove insufficient. Such a construction is urged by respondents, and we think it is entirely reasonable." *Laidlaw v. Portland, V. & Y. R. Co.* (1906) 42 Wash. 292, 84 Pac. 855. The railway company relied upon *Armour & Co. v. Western Constr. Co.* (1905) 36 Wash. 529, 78 Pac. 1106, as being a controlling decision. It was there held with reference to the constitutional feature of the act of 1893 (Session Laws, p. 32), entitled, "An Act Creating and Providing for the Enforcement of Liens for Labor and Material," that the portion of the body of the act which purported to create a liability for failure to take a bond from a railroad contractor, conditioned to pay for "provisions," is not sufficiently comprehended in the title. But the court said that, as the subject of liability for labor was not involved, and the act was not discussed with relation thereto, the opinion could not be said to be decisive of the case under review.

(b) *Medium of payment of wages.*—The title of the Maryland act of 1898, chap. 493, was, "An Act to Prohibit Railroad and Mining Corporations, Their Officers and Agents, from Selling or Bartering Goods, Wares, or Merchandise in Allegany County, to Their Employees." In the body of the act it was made unlawful for railroad or mining corporations to sell goods, wares, or merchandise, and for the officers and directors of such corporations to have any interest in any general merchandise store, or to sell to any person any goods, wares, or merchandise. Held, that the act was void. *Luman v. Hitchens Bros. Co.* (1890) 90 Md. 14, 46 L.R.A. 393, 44 Atl. 1051.

By Kentucky Acts 1902, p. 125, chap.

60, entitled, "An Act Concerning the Employees and Servants in Mining Work or Industry in This Commonwealth," the act of 1898 (Acts 1898, chap. 15, p. 59), in relation to the same subject, was amended, so as to provide that all persons and corporations engaged in mining should, on or about the 15th and 30th of each month, pay to within fifteen days of those dates each employee in lawful money, and that blacklisting should be unlawful. Held, that the amending act was valid. *Com. v. Reinecke Coal Min. Co.* (1904) 117 Ky. 885, 79 S. W. 287.

By Art. 4, § 19, of the Indiana Constitution, it is provided that an act shall be void only as to so much thereof as is not expressed in its title. The title of Acts 1901, p. 548 (Burns's Rev. Stat. 1901, § 7448a), is, "An Act Concerning the Issuance of Checks, Tickets," etc., "by Merchants, in Payment for the Assignment or Transfer of Wages of Employees in Coal Mines," etc. The body of the act provides that whenever "any merchant or dealer in goods or merchandise, or any other person," shall take from a miner an assignment of his wages in consideration of anything but lawful money, the check or token shall at once become payable in lawful money to the full value of the wages, to be recovered after demand, etc. Held, that the act must be construed as limited in its operation to merchants only, and for that reason was unconstitutional. *Dixon v. Poe* (1902) 159 Ind. 492, 60 L.R.A. 308, 95 Am. St. Rep. 309, 65 N. E. 518.

(c) *Exemption of wages.*—A title of a statute, "An Act to Provide for the Better Protection of the Earnings of Laborers, Servants, and Other Employees of Corporations, Firms, or Individuals, Engaged in Interstate Business," is sufficiently comprehensive to include legislation providing for the punishment of the persons who violate the statute by doing the things prohibited. *State ex rel. Green v. Power* (1902) 63 Neb. 496, 88 N. W. 769 (Neb. Code, § 531d). See also *Singer Mfg. Co. v. Fleming* (1894) 39 Neb. 679, 23 L.R.A. 210, 42 Am. St. Rep. 613, 58 N. W. 226.

(d) *Payment of wages at specified intervals.*—Under a constitutional provision that every act shall embrace but one subject and matters properly con-

nected therewith, which subject shall be expressed in the title, a clause providing for a penalty may be inserted in a statute requiring the weekly payment of wages, although there is in the title of the statute no specific mention of penalties. *Republic Iron & Steel Co. v. State* (1903) 160 Ind. 379, 62 L.R.A. 136, 66 N. E. 1005.

(e) *Payment of wages upon cessation of work.*—A Washington act entitled, "An Act to Provide for the Payment of Wages of Labor in Lawful Money of the United States, and to Punish Violations of the Same" (Ballinger's Anno. Codes & Stats., § 3305; Laws 1905, p. 219, chap. 112), forbade corporations, etc., to pay employees by order, draft, etc., or otherwise than in lawful money, unless such orders or drafts were negotiable and redeemable in money. A later act, entitled, "An Act Amending Section 1 of an Act Entitled" as above, declared wages earned by laborers to be payable whenever the laborer ceased work. Held, that the title of the amendatory act was broad enough to include the subject-matter. *Shortall v. Puget Sound Bridge & Dredging Co.* (1907) 45 Wash. 290, 122 Am. St. Rep. 899, 88 Pac. 212.

(f) *Misconduct of servants in relation to their work.*—A Wyoming act was entitled, "An Act Creating the Office of State Inspector of Coal Mines, Fixing Said Inspector's Salary and Prescribing His Duties, Also Providing for the Proper Ventilation of Coal Mines and for Other Purposes, and Providing for Appropriating Moneys for a Contingent Fund for Said Office." By § 7 of the act certain intentional acts of a miner, workman, or other person, endangering the lives or health of persons or security of mine or machinery, were made punishable as a misdemeanor. Held, that this provision was not void, as being beyond the scope of the title.

(g) *Abandonment of service.*—The Georgia statute (Laws 1903, p. 90), which makes it a misdemeanor for a servant to abandon the service after having fraudulently procured money on the faith of the contract has been sustained against the objection that it contains more than one subject-matter. *Banks v. State* (1905) 124 Ga. 15, 2 L.R.A. (N.S.) 1007, 52 S. E. 74.

(h) *Employment of women and children.*—The title of the Colorado "women and children act" (Sess. Laws

1903, chap. 138), entitled, "An Act to Prescribe and Regulate the Hours of Employment for Women and Children in Mills, Factories, Manufacturing Establishments, Shops, Stores, and Any Other Occupation Which May Be Deemed Unhealthful or Dangerous," was held not to be broad enough to cover a section therein prohibiting the employment of women for more than eight hours a day in a mill, factory, manufacturing establishment, shop, or store. The *ratio decidendi* was that the title related to occupations injurious to health, and the section in question treated of occupations which might not be unhealthful. *Burcher v. People* (1907) 41 Colo. 495, 498, 124 Am. St. Rep. 143, 93 Pac. 14.

The Illinois act of June 17, 1893, which was entitled, "An Act to Regulate the Manufacture of Clothing, Wearing Apparel, and Other Articles, etc.," and provided in its body (§ 5) that no female shall be employed in any factory or workshop more than eight hours a day, was pronounced void on the ground that this title embraces only employment in the manufacture of articles of the same kind as those expressly enumerated. *Ritchie v. People* (1893) 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 457.

The Maryland act, Laws 1902, chap. 566, entitled, "An Act to Repeal and Re-enact Section 4 of Article 100 of the Code of Public General Laws, as It Is Enacted by Chapter 317, Acts of 1894, Title 'Work, Hours of, in Factories,' Regulating the Employment of Children," has been sustained against the objections that, while the title only speaks of regulation, it prohibits the employment in any mill or factory, other than establishments for the manufacture of canned goods, of any child under fourteen years of age, except, etc.; and that its title appears to indicate that the title applied to the whole state, while a portion thereof was expressly excepted. *Mt. Vernon-Woodberry Cotton Duck Co. v. Frankfort Marine Acci. & Plate Glass Ins. Co.* (1909) 111 Md. 561, 134 Am. St. Rep. 636, 75 Atl. 105.

The Nebraska act of March 31, 1899, "To Regulate and Limit the Hours of Employment of Females in Manufacturing, Mechanical, and Mercantile Establishments, Hotels, and Restaurants; to Provide for Its Enforcement and a Penalty for Its Violation," contains but

one subject, and in its terms is no broader than its title, in which its subject is clearly expressed. *Wenham v. State* (1902) 65 Neb. 394, 58 L. R. A. 825, 91 N. W. 421. It was also held that this statute does not amend the act of 1883, to protect the health of female employees in stores, offices, and schools, but is an act complete in itself, and that it is not repugnant to § 11, art. 3, of the Constitution, which provides that no law shall be amended, unless the new act contains the section amended.

The Pennsylvania act of May 2, 1905, entitled, "An Act to Regulate the Employment in All Kinds of Industrial Establishments of Women and Children Employed," etc., has been unsuccessfully attacked on the ground that it does not cover the subjects of the various provisions contained in it. *Stehle v. Jaeger Automatic Mach. Co.* (1909) 225 Pa. 348, 133 Am. St. Rep. 884, 74 Atl. 215.

The Tennessee child labor law (Acts 1893, chap. 159) is entitled, "An Act to Make It Unlawful to Employ a Child Less Than Twelve Years of Age in Workshops, Mines, Mills, or Factories in This State." By Acts 1901, chap. 34, an amendment of the act of 1893 was attempted under a title, "An Act to Amend Chapter 159 of the Acts of 1893, Being an Act Entitled, 'An Act to Make it Unlawful to Employ a Child Less Than Twelve Years of Age in Workshops, Mines, Mills, and Factories in This State;'" the act of 1901 raising the age of children that might not be so employed from twelve to fourteen years. Held, that the amended act was invalid, as violating the constitutional provision that no bill shall become a law which embraces matter not expressed in its title. *Jackson v. Weis & L. Mfg. Co.* (1911) 124 Tenn. 421, 137 S. W. 757.

(i) *Employers' liability.*—The subject of the Colorado statute, abrogating the doctrine of common employment, is sufficiently expressed by the title, "An Act Concerning Damages Sustained by Agents, Servants, and Employees." *Colorado Mill & Elevator Co. v. Mitchell* (1899) 26 Colo. 284, 55 Pac. 28, affirming (1898) 12 Colo. App. 277, 55 Pac. 736.

The subject of the Indiana employers' liability act of 1893 is sufficiently expressed in the title, "An Act Regulating Liability of Railroads and Other Corporations except Municipal." The

court followed *McAunich v. Mississippi & M. R. Co.* (1866) 20 Iowa, 338. *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery* (1898) 152 Ind. 1, 69 L.R.A. 875, 71 Am. St. Rep. 301, 49 N. E. 582.

The Iowa Code, § 2071, in its original form, imposed a liability on railway corporations in favor of their employees for injuries through the negligence of fellow servants, regardless of any contract restricting such liability. Afterwards it was amended (Acts 27th Gen. Assemb. p. 33, chap. 49), so as to provide that no contract of insurance, relief, or indemnity, in case of injury or death, entered into prior to the injury between the person so injured and such corporation or any other person or association, etc., should be a defense to any action brought under such section. Held, that the provisions of the amendment were germane to those of the original act, and were therefore properly covered by a title reciting that the amendment was "An Act to Amend Code, § 2071." *McGuire v. Chicago, B. & Q. R. Co.* (1906) 131 Iowa, 340, 33 L.R.A. (N.S.) 706, 108 N. W. 902.

The New Jersey act of April 13, 1909 (P. L. p. 114), entitled, "An Act to Extend and Regulate the Liability of Employers for Injury or Death to Employees in Certain Cases," was held valid for the reason that the words "in certain cases" do not introduce such vagueness and uncertainty into the title as to invalidate the act. *Quigley v. Lehigh Valley R. Co.* (1911) 80 N. J. L. 486, 79 Atl. 458. In that case the contention that the object as expressed in the title of the act is narrower than that set forth in the body of the act, in this respect, that, while purporting by its title only to extend and regulate the liability of employers, it at the same time regulates the right of action by employees, was rejected, for the reason that the former is required to be expressed in the title, but the latter is not.

The contention that the subject of the Texas fellow servant act of 1891 is not sufficiently expressed in the title, "An Act to Define Who Are Fellow Servants and Who Are Not Fellow Servants," has been rejected. *Galveston, H. & S. A. R. Co. v. Worthy* (1894) — Tex. Civ. App. —, 27 S. W. 426; *Gulf, C. & S. F. R. Co. v. Calvert* (1895) 11 Tex. Civ. App. 297, 32 S. W. 246.

The act in Laws Tex. 1897, Sp. Sess.

p. 14, entitled, "An Act to Prescribe and Define the Liability of Persons, Receivers, or Corporations Operating Railroads or Streets Railways, for Injuries to Their Servants and Employees, and to Define Who Are Fellow Servants, and to Prohibit Contracts between Employer and Employee Based on the Contingency of Injury or Death of the Employee, Limiting the Liability of the Employer for Damages," is valid. *Mexican Nat. R. Co. v. Jackson* (1902) 55 C. C. A. 315, 13 Am. Neg. Rep. 245.

(j) *Specific duties of masters.*—The California act, Stat. 1909, p. 279, chap. 181, entitled, "An Act Regulating the Hours of Employment in Underground Mines and in Smelting and Reduction Works," provides that the period of employment for all persons engaged in underground mines or in smelters and institutions for the reduction or refining of ores should not exceed eight hours within any twenty-four, is not invalid on the ground that the act and title embrace more than one subject. *Re Martin* (1910) 157 Cal. 51, 26 L.R.A. (N.S.) 242, 106 Pac. 235.

The Indiana act March 2, 1891 (Acts 1891, p. 57; Burns's Rev. Stat. 1894, §§ 7461-7476), entitled, "An Act Regulating the Weighing of Coal, Providing for the Safety of Employees, Protecting Persons and Property Injured, Providing for the Proper Ventilation of Mines, Prohibiting Boys and Females from Working in Mines, Conflicting Acts Repealed, and Providing Penalties for Violation," regulates the weighing of coal delivered from the mines, provides the manner in which mines shall be supported for the protection of employees working therein, designates means for the proper ventilation of mines, provides that a competent mine boss shall be employed, and vests the right of action for the recovery for the death of an employee, caused by the violation of any of its provisions, in certain persons. Held, that the act is valid. *Maule Coal Co. v. Partenheimer* (1899) 155 Ind. 100, 55 N. E. 751.

The title of the Missouri act, "An Act Requiring Persons, Associations and Corporations Owning or Operating Street Cars to Provide for the Well-Being and Protection of Employees" (Acts 1897, p. 102), sufficiently indicates the subject-matter to be a requirement that electric street cars be equipped with screens for protection of motormen, and the imposition of a penalty for

operation of such cars without the screen. *State v. Whitaker* (1901) 160 Mo. 59, 60 S. W. 1068.

The title of the Missouri act, Laws 1891, p. 159, entitled, "An Act Relating to Manufacturing, Mechanical, Mercantile, and Other Establishments and Places, and the Employment, Safety, Health, and Work Hours of Employees," was held not to be sufficiently broad to cover provisions regulating the construction of platforms, passageways, and other structures in and around railroad yards and depots. The *ratio decidendi* was that, under the doctrine of *ejusdem generis* the words "other establishments and places" must be construed as referring to establishments and places similar to those specifically enumerated, and not to railroads and railroad employees, treated as separate subjects for legislation. *Williams v. Atchison, T. & S. F. R. Co.* (1911) 233 Mo. 666, 136 S. W. 304. It was also held that the title would be objectionable as containing more than one subject, unless the words "and other establishments and places" were construed by the rule *ejusdem generis*.

The subject-matter of the Montana statute (Laws 1897, p. 245), by which it is declared to be unlawful for any corporation to sink or work through any vertical shaft where mining cages are used, to a greater depth than 300 feet, unless such shaft shall be provided with an iron-bonneted safety cage, is sufficiently expressed in its title, *viz.*, "An Act to Amend Section 705 of Title X. of the Penal Code of the State of Montana, to Have the Cages in All Mines Cased in." *State v. Anaconda Copper Min. Co.* (1900) 23 Mont. 498, 59 Pac. 854.

(k) *Character of servant.*—The Minnesota statute, Laws 1895, chap. 174, entitled, "An Act to Prohibit the Practice of Blacklisting and the Coercing and Influencing of Employees," and forbidding the combination of two or more employers for the purpose of preventing any person from procuring employment, and prohibiting employers from requiring their employees not to join labor organizations, etc., is not repugnant to the Constitutional provision, that no law shall embrace more than one subject, which shall be expressed in its title. *State ex rel. Schaffer v. Justus* (1902) 85 Minn. 279, 56 L.R.A. 757, 89 Am. St. Rep. 550, 88 N. W. 759.

A. ENACTMENTS RELATING TO WAGES.

2813. Enactments according a priority to claims for wages under certain circumstances.—(See chapter XXII., *ante*). The courts have sustained enactments by which a priority is accorded to the claims of certain specified descriptions of employees for services rendered within a stated period before the insolvency of the employers, or some

(1) *Wrongful interference by third persons.*—The Louisiana act No. 50 of 1892, entitled, "An Act to Enforce Labor Contracts," which makes it a misdemeanor for persons not parties to contracts wilfully to interfere therein, and prescribes a penalty for enticing any person to leave his employer or the place rented before the expiration of his contract, upon which money or goods have been advanced, was held to be violative of Const. art. 31, in so far as the body of the act was broader than its title in referring to landlord and tenant. But it held further that this portion might be stricken out and the legal part enforced. *State v. Goff* (1901) 106 La. 270, 30 So. 844.

The entire Georgia act of December 17, 1901 (Acts 1901, p. 63), as amended by the act of August 2, 1903 (Acts 1903, p. 91), is not rendered repugnant to the constitutional provision that an act shall not contain matter different from that expressed in the title, by the insertion in the body of the act of the words "or to disturb in any way said relation." But so much of the act as is contained in the words just quoted does contain matter different from that expressed in the title, and should be eliminated from the act. After this is done there remains a complete and valid statute, which carries out the legislative intent. *Pearson v. Bass* (1909) 132 Ga. 117, 63 S. E. 798 (syllabus written by the court). It was furthermore held that the fact that the act provides for a penalty upon one coming within the provisions of the act, and that this penalty may be enforced by civil or criminal procedure, does not render the act itself repugnant to the constitutional provision that no law shall pass which refers to more than one subject-matter.

(m) *Union labels.*—The act entitled, "An Act to Protect Associations, Unions of Workingmen, and Persons in Their Labels, Trademarks, and Forms

of Advertising," does not violate a constitutional provision that "no act shall embrace more than one subject, and that shall be expressed in the title."

The title of the New Jersey act of March 21, 1892, "A Further Supplement to an Act Entitled, 'An Act to Protect Trademarks and Labels,'" was held to express the object of the law, the protection of trademarks and labels, although in fact there was no prior act entitled, "An Act to Protect Trademarks and Labels."

In *Perkins v. Heert* (1899) 158 N. Y. 306 (Syll.), 43 L.R.A. 858, 70 Am. St. Rep. 483, 53 N. E. 18, the objection that the New York enactment as to union labels is within the condemnation of § 16, article 3, of the Constitution, which provides that "no private or local bills, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title," was thus met by the court: "We have already shown that the act is a general law, and not a private nor local bill. It consequently is not brought in conflict with this provision. Furthermore, we think but one subject is mentioned in the title, and that is the better protection of skilled labor by the registration of labels, etc., covering the products of such labor."

The Pennsylvania act of May 21, 1895, P. L. 95, amended by the Acts of May 2, 1901, P. L. 114, and April 3, 1903, P. L. 134, and entitled, "An Act to Provide for the Adopting of Trademarks, Labels, Symbols, or Private Stamps by an Incorporated or Unincorporated Association or Union of Workingmen, and to Regulate the Same," has been held not to be defective in title. *Com. v. Meads* (1905) 29 Pa. Super. Ct. 321.

The title, "An Act Relating to Trademarks," is sufficient to include penal provisions for violations of the act. *State v. Montgomery* (1910) 57 Wash. 192, 106 Pac. 771.

other event which is usually succeeded by a general distribution of their property among their creditors.¹ The rationale of this doctrine is, that the legislature has power to declare the relative rank of such pecuniary obligations as may be created in the future, that contracts made after an enactment of this character has come into force are presumed to have been made with reference to it, and that, as it operates only in respect to the period subsequent to its passage, it is not invalid, as impairing the obligation of contracts.²

2814. Enactments granting absolute liens for wages.—(See chap. XXII. *ante*.) A discussion of the constitutionality of this class of enactments may appropriately be prefaced by the following statement extracted from the opinion in one of the cases in which the subject was considered: "In all or nearly all of the states there are statutes intended to give liens to those who contribute labor or materials to the enhancement or improvement of the land or buildings of an owner. These statutes vary in their character and purpose. Originally they were chiefly acts giving a lien to persons having direct contractual relations with the owner.¹ Such statutes did not protect those who contributed to the improvement through dealings with the contractor, and were soon followed by statutes extending the lien to persons not contractually connected with the owner, but who furnished labor or materials for the building through contracts with the principal contractor. This was accomplished in two ways:

"(1) By giving to creditors of the contractor a derivative lien, whereby they were substituted to the rights of the contractor as they existed when notice was given of the claim. Such statutes were in the nature of mere garnishee or attachment proceedings, and were subject to no criticism as doing injustice to the owner. Payment in advance was a defense under all such statutes, for the contractor's creditors could stand in no better situation that he did. So, if he had no

¹ The validity of such an enactment was affirmed in *Graham v. Magann Fawke Lumber Co.* (1904) 118 Ky. 192, 80 S. W. 799, 4 Ann. Cas. 1026 (Ky. Stat. 1903, § 2488). The report does not show upon what grounds the validity of the act was assailed.

The California enactment (see § 726, *ante*), which provides for the preference of labor claims in cases where execution, etc., are issued against the person for whom the labor was performed, has been sustained against the objections that it operated so as to deprive a debtor of his property without

due process of law and that it is special legislation. *Mohle v. Tschirch* (1883) 63 Cal. 381.

² *Small v. Hammes* (1900) 156 Ind. 556, 60 N. E. 342 (Ind. Acts 1885, p. 95. Burns's Rev. Stat. 1894, § 7051).

¹ In *Hahn v. Sleepy Eye Mill Co.* (1907) 21 S. D. 324, 112 N. W. 843, it was held that S. D. Code Civ. Proc. § 737, giving a paramount lien to the owners and operators of threshers, is not unconstitutional as restricting the right to contract with reference to a legitimate subject.

lien his creditors had none, as their utmost right was to be substituted to the contractor's place.

“(2) Or by statutes which gave to those who furnished such labor or materials to the contractor a direct or independent lien upon the building and land of the owner. Under these, payments to the contractor prior to expiration of the time within which notice might be given were ineffectual, the lien not being a derivative one, but independent of that given the contractor. Some of these statutes sought to diminish the severity of this legislation by limiting the aggregate of such liens to the original contract price, or by providing for a contractor's bond for the benefit of the owner with summary remedy thereon, or by both. The verbiage of statutes of the latter class varies. In some, the contractor is declared to be the agent of the owner, and as such authorized to obtain labor and materials upon the credit of the owner, or his building and land, or both.”²

2815. Same subject further discussed.—The validity of the enactments belonging to the second of the categories above specified has been affirmed in all the cases in which a violation of the “equality clauses” of the Federal and state Constitution has been urged as a ground for annulment.¹ “It is clear that they apply equally to all the citizens of the state who bring themselves within the remedial scope” of their provisions.²

The objection that they are invalid as impairing the obligation of contracts clearly cannot be raised except by persons whose contractual rights were vested before they came into force.³

² *Jones & Laughlins v. Great Southern Fireproof Hotel Co.* (1898) 30 C. C. A. 108, 58 U. S. App. 397, 414, 86 Fed. 370. This summary is extracted from the opinion of Judge Lurton, which was adopted in its entirety, and with special commendation by the Supreme Court of the United States in its affirming judgment. *Great Southern Fire Proof Hotel Co. v. Jones* (1903) 193 U. S. 532, 539, 540, 48 L. ed. 778, 783, 784, 24 Sup. Ct. Rep. 576.

¹ *Gilchrist v. Helena, H. S. & Smelter R. Co.* (1893) 58 Fed. 708; *Quale v. Moon* (1874) 48 Cal. 478 (miners' lien law, 1867); *Carpenter v. Furrey* (1900) 128 Cal. 665, 61 Pac. 369 (mechanics' lien law); *Summerlin v. Thompson* (1893) 31 Fla. 369, 12 So. 667 (mechanics' lien law); *Warren v. Sohn* (1887) 112 Ind. 213, 13 N. E. 863, (miners' lien law, 1879); *Smalley v. Gearing* (1899) 121 Mich. 190, 79 N. W.

1114, 80 N. W. 797 (mechanics' lien law); *Phelan v. Terry* (1907) 101 Minn. 454, 112 N. W. 872 (Minn. Rev. Laws 1905, § 3546—threshers' lien); *Cole Mfg. Co. v. Falls* (1891) 90 Tenn. 466, 16 S. W. 1045 (mechanics' lien law); *Virginia Development Co. v. Crozer Iron Co.* (1893) 90 Va. 126, 44 Am. St. Rep. 893, 17 S. E. 806 (statute giving liens to persons furnishing supplies to a manufacturing corporation—Code, § 2486).

² *Barrett v. Millikan* (1901) 156 Ind. 510, 83 Am. St. Rep. 220, 60 N. E. 310.

³ *Rule affirmed with respect to principal employer.*—*Barrett v. Millikan* (1901) 156 Ind. 510, 83 Am. St. Rep. 220, 60 N. E. 310; *Smalley v. Gearing* (1899) 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797; *Gurney v. Walsham* (1890) 16 R. I. 698, 19 Atl. 323; *Albright v. Smith* (1893) 3 S. D. 631, 54 N. W. 816; *Spokane Mfg. & Lumber Co.*

2816. Same subject further discussed.—The congruity of these enactments with the "due process" clauses of the Federal and state Constitutions has been discussed under two different aspects.

In one class of cases the point considered has been whether the fact of their containing no explicit provision by virtue of which the enforceability of the lien was made conditional upon the principal employers having been notified of the lienor's claim was a sufficient ground for annulling them, on the theory that they operated so as to deprive the farmer of his property without his having an opportunity to submit a defense. In two states this fact has been treated as being fatal to their validity.¹ In two other states the opposite doctrine has

v. *McChesney* (1889) 1 Wash. 609, 21 Pac. 198.

Rule affirmed with respect to third persons.—In *Crowther v. Fidelity Ins. Trust & S. D. Co.* (1898) 29 C. C. A. 1, 42 U. S. App. 701, 85 Fed. 41, the provision of code § 2485 (adopted in 1887), to the effect that persons furnishing certain supplies to mining or other specified companies should have a lien prior to mortgages executed since March 21, 1877, was held inoperative to displace the lien of a mortgage executed in 1881, which at that time, became by contract a vested first lien. The *ratio decidendi* was that to allow it such an operation would be to impair the obligation of the contract.

In *Sitton v. Dubois* (1896) 14 Wash. 624, 45 Pac. 303, the act (Gen. Stat. 1891, § 1695, Ballinger, Anno. Codes & Stats. 1897, § 5957) which accords to the liens of farm laborers upon crops that they have assisted in raising a priority in respect to all other liens was upheld in a case where the crop had been mortgaged before any labor had been expended upon it.

In *Virginia Development Co. v. Crozer Iron Co.* (1893) 90 Va. 126, 44 Am. St. Rep. 893, 17 S. E. 806, where the enactment under review related to a specific class of corporations, the contention that it was invalid as impairing the charter right of such corporation to issue its bonds and secure them was rejected on the ground that the charter was taken subject to the general law of the state and such changes as might be made in that law.

In *Wimberly v. Mayberry* (1891) 94

Ala. 240, 14 L.R.A. 305, 10 So. 157, it was remarked that "no injustice is done in preventing the holder of the older lien from appropriating the labor and material of others, by which his security is enhanced, without compensation."

In *Sutton v. Consolidated Apex Min. Co.* (1902) 15 S. D. 410, 89 N. W. 1020, modifying (1900) 14 S. D. 33, 84 N. W. 211, it was contended that an amendment of the South Dakota miners' lien act (Laws 1895, chap. 134) impaired the obligation of certain mortgage contracts, because by its term it postponed the mortgage lien to a miner's lien filed after the mortgages were recorded. But, as it appeared that the party asserting the miner's lien commenced work long before the execution of the mortgages, the court said it was unnecessary to consider the constitutionality of the amendment from this point of view.

¹ In *Jacobs v. Knapp* (1870) 50 N. H. 71, the court thus characterized the New Hampshire log lien law then in force: "It is entirely subversive of the fundamental principle of all free governments, that no person can be deprived of, or prejudiced in, his property or rights by the judgment of any court, unless he has notice of such proceedings and an opportunity to defend. That notice and that opportunity is not afforded by any provision of law." This statement was quoted with approval in *Quimby v. Hazen* (1881) 54 Vt. 132, where the Vermont log lien law was annulled.

been adopted.² The present writer ventures to express the opinion that the latter of these views is the correct one. There seems to be no good reason why the assumption should not be entertained that, in framing a provision of this tenor, the legislature intended that the proceedings for the enforcement of the lien should be conducted with due regard to the fundamental right of the principal employer to be granted a hearing in a properly constituted court, before the claims against his property are finally adjusted.

In another class of cases the courts have been called upon to deal

² In *Winslow v. Urquhart* (1875) 39 Wis. 260, it was held that the Wisconsin log lien laws were valid, although they did not require that the general owner of the logs in controversy should be made a party. The court relied on *Munger v. Lenroot* (1873) 32 Wis. 541, where the same doctrine was taken for granted. The only question actually discussed was whether the statute should be construed as giving a lien on the logs, whether the work in respect of which the lien was claimed was or was not performed under a contract with the owner or not. This question was answered in the affirmative, against the opinion of Dixon, Ch. J., who contends that such a construction would render the statute invalid.

In *Brown v. Markham* (1895) 60 Minn. 233, 30 L.R.A. 84, 62 N. W. 123 (for statute, see § 750, *ante*), the court thus discussed the contention that the Minnesota log lien law 1875 was unconstitutional because it did not contain any specific requirement that notice of the pendency of the proceedings with regard to the lien should be given to the owner of the logs: "It is true that the only defendant contemplated by the law is the person liable for the payment of the debt itself, except in cases of intervention, and frequently such person is not, and never has been, such owner. . . . Upon the theory that the judgment in lien proceedings is conclusive against the owner of the property, the objection cannot be overcome. Treating the action as a proceeding *in rem* as to the logs, the mere constructive seizure of them by filing a copy of the writ of attachment and of the sheriff's return thereon in the office of the surveyor general is clearly inadequate as notice

to the owner. If we treat the action as one *in personam*, there is also an entire absence of any provision for notice to the owner, such as would constitute a 'due process of law.' But if the only effect of the action is to protect or continue the lien of the laborer, if he have one, leaving the lien still *in pais* as to the log owner, who still has the right to contest it on the merits whenever his property is seized or interfered with, then there can be no constitutional objection to the law. Although the judgment in the statutory action would be as to the owner of the logs *res inter alios acta*, yet it would be competent for the legislature to make it *prima facie* evidence against him. That would be a mere rule of evidence. . . . Under our view of the statute of 1876, an opportunity is given the owner of the logs to contest the right of the claimant to a lien in an action like this to recover the property, or its value in case a recovery cannot be had. . . . The owner of the standing pine knows perfectly well when he enters into a contract for lumbering that labor must be performed which, day by day, enters into the material and enhances its value; and he knows equally as well that the laborers have the right to protect themselves in the matter of compensation by putting a lien on the logs. Knowing this, and having it within his power to care for his own interests when contracting for the work, the owner of the logs cannot say that a law which simply secures payment to the men who perform the manual labor is unreasonable."

In *Redington v. Frye* (1857) 43 Me. 578, the validity of a log lien law was taken for granted, no question having been raised on that score.

with the question whether the right of contract is improperly restricted by a statute which makes due provision for notice to the principal employer; and, subject to that notice, purports to create in favor of subcontractors, and of laborers in the service of the contractor, a lien that shall attach to the property of the principal employer, without regard to the state of the accounts between him and the contractor. An examination of the cases collected in the subjoined note will show that the preponderance of authority is overwhelmingly in favor of the doctrine that the question demands a negative answer.³

³ *Federal courts.*—In *Jones v. Great Southern Fireproof Hotel Co.* (1898) 30 C. C. A. 108, 58 U. S. App. 397, 86 Fed. 370, reversing (1897) 79 Fed. 477, the court rendered with regard to the Ohio statutes (see this note, *infra*), a decision the purport of which was stated by the Supreme Court in affirming judgment (*Great Southern Fireproof Hotel Co. v. Jones* [1904] 193 U. S. 532, 48 L. ed. 778, 24 Sup. Ct. Rep. 576) to be this: "That the statute did not deprive the owner of his property without due process of law, nor unreasonably interfere with his liberty of contract; that the restraints put upon the owner by the provisions in favor of subcontractors and those who furnished materials to be used by the contractor in execution of his contract with the owner, were neither arbitrary nor oppressive; that such provisions were no more onerous than required by the necessity of protecting those who actually do the work or furnish the material by which the owner is benefited; and that as the legislation in question was sanctioned by the dictates of natural justice, and, as much be conclusively presumed, was known to the owner when he contracted for the building of his house, its requirements could only be avoided by pointing out some specific part of the organic law which has been violated by its enactment." The Supreme Court thus stated its own views: "We are constrained to withhold our assent to the views expressed by the supreme court of Ohio, and to express our concurrence with the circuit court of appeals. The great weight of authority in this country as to the meaning and scope of the constitutional provisions substantially like those to be found in the Constitution of Ohio is in our opinion, against the conclusion reached by the learned state court. Ex-

ercising an independent judgment on the subject, we are obliged to so declare."

California.—The act of March 30, 1868 (Laws 1867-68, p. 589, chap. 448) provided that materialmen and laborers should have a lien upon a building to secure the amounts due them, "whether done or furnished at the instance of the owner of the building or other improvement, or his agent; and every contractor, subcontractor, architect, builder, or other person having charge of any mining, or of the construction, alteration, or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purposes of this act." In *Hicks v. Murray* (1872) 43 Cal. 515, this statute was held not to be invalid either as attempting to appoint agents for private persons, as confiscating property or in respect of the notice required of owners as to responsibility for improvements, or that as attempting to take away vested rights or to clothe private persons with power to divest citizens of their property.

In *Renton v. Conley* (1874) 49 Cal. 185, the court construed this act as limiting the lien to the amount due from the owner to the contractor under the contract at the time when notice of the filing of the lien was given the owner, but no constitutional question was raised or decided.

In *Kellogg v. Howes* (1889) 81 Cal. 170, 6 L.R.A. 588, 22 Pac. 509, where the effect of a provision making the recording of the contract a condition precedent to its validity was under consideration, the court made the following remarks: "It has been held, . . . and very properly, that where there is a valid contract, the owner cannot be compelled to pay more than he has contracted to pay, unless he is

notified of the claims of subcontractors before payment to the contractor. But that is not this case. Here there was no contract. If the legislature had the power to say to the owner, If you pay the contractor, after notice from the subcontractor of his claim, you shall still be liable to the latter, it has the undoubted right to say to him, If you do not execute your contract in a certain form, and file it in the recorder's office, you shall be liable to materialmen and laborers for the value of their material and labor."

In *Lambert v. Davis* (1897) 116 Cal. 292, 48 Pac. 123, it was contended that to construe the threshers' lien act of 1885 so as to give to one not employed by the actual owner the benefit of the lien, would render it obnoxious to the constitutional objection of authorizing a deprivation of the property of the owner without due process of law. But the court said: "This precise question was presented and decided by the court in bank in the case of *Chuch v. Garrison* (1888) 75 Cal. 199, 16 Pac. 885, where it was held that the statute applied to exactly such a case, and that the lien could be constitutionally maintained,—'that the actual ownership of the property was an immaterial circumstance;' the obvious theory, and, as we deem it, the correct one, being that one lawfully holding from the actual owner the possession and right to operate the machine is to be deemed, for the purposes of the statute, the owner of the property."

Colorado.—In *Jensen v. Brown* (1875) 2 Colo. 694, the conclusions of the court were thus stated: "There is no provision in the Constitution of the United States, nor in the organic act, which precludes the legislature of the territory of Colorado from declaring a statutory lien in respect to future contracts in favor of the contractor, subcontractor, or laborer upon the building and premises of the owner for whose benefit services have been performed or materials furnished in erecting his building. . . . The language of some of the sections preceding the 6th section of the act under consideration is so broad that, if taken alone, it would give a lien to subcontractors, and persons contributing labor and materials, for the full amount due them respectively from the contractor, without regard to payment in good faith, without notice of lien, of

the full contract price by the owner to the original contractor. Such a construction might, in many cases, work manifest injustice to the owner by compelling him to pay, for the erection of a building, an amount far exceeding the contract price, and far exceeding the value of the building, and might, in this respect, leave the statute open to the objection of impairing the obligation of contracts. We, however, do not think such to be the true construction of the statute under consideration; but construing the 6th section of the act with the preceding sections, we hold the act to give a lien, when its provisions are complied with, to the subcontractor and persons furnishing labor and materials for the value thereof, but not in amount exceeding the balance due, at the time of notice, from the owner to the original contractor; and in case the owner fraudulently fails to comply with the provisions of the 6th section of the act on his part, *i. e.*, fails to withhold from the original contractor the balance due him, or an amount sufficient to satisfy the established claim of the lienor, gives the lienor a right of action against the owner for the amount of the established claim."

In *Chicago Lumber Co. v. Newcomb* (1903) 19 Colo. App. 265, 74 Pac. 786, the mechanics' lien law (Session Laws 1893, chap. 117), which gives to persons furnishing material or performing labor for the principal contractor a lien against the property of the owner for the full value of their material or labor, regardless of the contract price, if the owner fails to comply with the clauses which prescribe the form of contract which must be entered into and recorded by the owner and contractor, in order to enable the contractor to secure a lien for himself, and the owner to confine the liabilities to which his property may be subjected to the contract price, was held not to interfere with the constitutional right of the citizen to contract as his interest may demand, and to be not repugnant to the provisions of the Constitution which guarantee to citizens the right of acquiring, possessing, and protecting property, and inhibit the enactment of laws impairing the obligation of contracts, or depriving any person of life, liberty, or property without due process of law. It was also laid down that the fact that the statute makes the contractor the

agent of the owner for the purpose of the act does not invalidate it. The court said: "The statute simply imposes upon the owner a duty to see that those by means of whose property and services the value of his own property is enhanced, receive the compensation to which they are justly entitled. In making his contract he knows that labor and material will be necessary for the accomplishment of the work, and that the contractor may obtain those things on credit from others, but the benefit of which he will nevertheless receive and enjoy; and the effect of a law charging the property into which they enter with a lien on account of the values which thus accrue to him is not to subject him to a penalty, or to interfere with any of his constitutional rights."

Indiana.—In *Smith v. Neubaur* (1895) 144 Ind. 95, 33 L.R.A. 685, 42 N. E. 40, the court thus dealt with the argument that § 7257, Rev. Stat. 1894, providing that a mechanics' lien may be acquired by filing in the recorder's office a notice of intention to hold the lien, within sixty days after performing labor or furnishing material is unconstitutional: "Under the law as enacted, counsel contend, anyone may perform labor or furnish material in the construction of a building for a landowner, without such owner's knowledge or consent, and then secure a lien upon the land and building by notice filed after the work is done or materials furnished. It is said that the property owner should have notice at or before the doing of the work or the supplying of the materials, so that he may, if he wishes, prevent the doing of such work or the furnishing of such materials, and so keep his property free of the lien. It has often been held that every statute under which a contract is made enters into and forms a part of such contract. The appellants, in the contract for the erection of the dwelling house upon their property, are therefore chargeable with knowledge of, and are bound by, all of the provisions of our mechanics' lien law then in force. By the terms of the agreement entered into, the contractors were to furnish all materials necessary for the construction of the building. This was notice that such materials were to be furnished; and the law under which the contract was made was further notice that the building and ground upon which it was to be erected

would be liable to a lien for the value of the materials so furnished. The only uncertainty left was whether those who should furnish the material would claim the lien therefor. That uncertainty is provided for in the statute, which requires that the notice of intention to hold the lien be filed in the recorder's office within sixty days. The owner has, consequently, ample means of protection, and is not liable to a lien without notice, nor to have his property taken without due process of law."

In *Barrett v. Millikan* (1901) 156 Ind. 510 (Syll.), 83 Am. St. Rep. 220, 60 N. E. 310, the contention that this law is invalid because it interferes with the freedom of the citizen to make contracts for the improvement of his property was again rejected.

Maine.—In *Spofford v. True* (1848) 33 Me. 283, 54 Am. Dec. 621, a log lien law was held not to be invalid as abridging the constitutional right of a citizen with regard to "acquiring, possessing, and protecting property."

The validity of a mechanics' lien law was taken for granted in *Atwood v. Williams* (1855) 40 Me. 409, and *Taggard v. Buckmore* (1856) 42 Me. 77. In the former case the lien of the materialman was enforced although the owner had made full payment to the contractor between the time when the building was completed and the time when notice of the lien was filed.

Massachusetts.—In *Bowen v. Phinney* (1895) 162 Mass. 593, 44 Am. St. Rep. 391, 39 N. E. 283, the validity of a lien law which does not specifically limit the liability of the owner to the amount of the contract price was taken for granted; the actual point decided being that the enforceability of the lien did not depend upon the terms of the contract or the state of the account between the owner of the land and the employer of the laborers.

Michigan.—In *Shaw v. Bradley* (1886) 59 Mich. 199, 26 N. W. 331, the contention that the log lien law is unconstitutional "because it undertakes to provide for a process whereby a person's property may be seized and sold without the service of process, either actual or constructive, judicial, executive, or administrative, and where there are no contract relations, express or implied, between the owner of the logs and the party who obtains the judgment," was thus discussed: "I do not think the ob-

jection raised as to the unconstitutionality of the act is open to the defendants in this case. The record shows that there were contract relations between the plaintiff and the defendants, and that they were personally served with the process by which the suit was commenced. I have no doubt but that it is competent for the legislature to provide for security, by way of a lien in behalf of a laborer, and also to provide a remedy for the enforcement of such lien by attachment in cases where the possession of the property upon which the labor is performed is not retained by the person performing such labor. No difficulty can arise in the enforcement of the lien in a simple case of a contract between the owner of the logs or other property subjected to lien and the person or persons performing the labor. If there may be cases in which the law cannot be enforced because of its invasion of vested rights, or failure to bring the proper parties before the court, this is not one of them, and the difficulties which may, in some cases, arise in enforcing its provisions, need not be anticipated."

In *Reilly v. Stephenson* (1886) 62 Mich. 509, 29 N. W. 99, the court laid it down with regard to the same statute: "It is competent for the legislature to enact that the lien shall attach to the logs of the owner, although the labor was performed for one who had contracted with the owner to cut, haul, and deliver the logs for a gross sum, which the owner has paid." The constitutionality of the act was also affirmed in *Craddock v. Dwight* (1891) 85 Mich. 587, 48 N. W. 644.

In *Smalley v. Gearing* (1899) 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797, the mechanics' lien law of 1891, as amended by the act of 1893, by which the owner is authorized to withhold from the contractor the amounts shown by the latter's sworn statement to be owing to subcontractors, laborers, and materialmen, and is subjected to liability to such persons in case payments are made in disregard of or without requiring such statement, was sustained against the objection that it improperly restricted the right of contract. The argument put forward against the constitutionality of the act was that, by the amendment, the owner was prohibited from paying the contractor in accordance with the terms of the

contract, and the contractor was prevented from obtaining his pay whenever it appeared from the sworn statement that there were bills outstanding in favor of subcontractors and laborers. But the court said: "By the terms of the act, the owner is not liable to lien claimants in any greater amount than he contracted to pay the original contractor; is entitled to recoup any damages sustained by reason of a breach of the contract; and may protect himself in making payments by requiring such sworn statement, or seeing that the payments are distributed among those who might acquire liens. In these respects the act differs from that of 1887, which was held unconstitutional in *John Spry Lumber Co. v. Sault Ste. Bank, Loan & T. Co.* (1889) 77 Mich. 199," 6 L.R.A. 204, 18 Am. St. Rep. 396, 43 N. W. 778. (See § 2818, note 1, *post*.)

Minnesota.—In *Bohn v. McCarthy* (1881) 29 Minn. 23, 11 N. W. 127, the court, referring to the mechanics' lien law of 1878, said: "Such a lien is not a charge imposed upon the property of the owner by legislative enactment, without his consent and without process of law. Parties contracting while such a statute is in force, which is intended to annex certain incidents to such contracts, and which provides that a lien shall attach in certain cases, are presumed to contract with reference to such statute."

In *Laird v. Moonan* (1884) 32 Minn. 358, 20 N. W. 354, the court said: "As such liens are encumbrances upon the owner's title, they can only be created by his consent or authority; and it is upon this ground that such legislation is supported. The statute annexes the lien as an incident to the contract of the owner with the contractor or builder, and such contract is the evidence of the authority of the latter to charge the building and land with liabilities incurred by him in performing his contract. . . . 'The owner consents to this power conclusively and irrevocably, so far as others than the builder are concerned by making a contract while such is the law.' . . . As respects the amount which may thus be secured, their rights are not dependent upon or limited by the amount due the contractor from the owner under the original contract, nor by the state of the accounts between them. It is sufficient that the liens are created through the owner's contract, from which his con-

sent is implied. To avoid the encumbrance of such liens the owner takes the burden . . . of securing the bond therein [by the act] provided. Whether the burden of taking such proceedings for his own protection should thus be cast on him, or whether subcontractors and laborers should be left to proceed against the amount due, as under the former practice, was entirely a question of legislative policy. And this is sufficient to dispose of the objection that the law unreasonably limits the exercise of the owner's discretion as to the persons whom he shall contract with; that is to say, to such as can give bonds or are financially responsible for the contracts they may make in the prosecution of the work. It is strictly in conformity with the policy which allows a lien in any case. It does not take away or affect the rights of the owner any further than it may be necessary for the security of those who are presumed to have added something to the owner's property equal to the expenses incurred. *Spofford v. True* (1851) 33 Me. 283, 54 Am. Dec. 621; *Taggard v. Buckmore* (1856) 42 Me. 77. It is ordinarily understood from the nature of the case, that under building contracts the work is not to be done wholly by the contractor; and it is a sound and just principle that all those who have, by consent of the owner, or in pursuance of contracts with him for that purpose, contributed to increase the value of his property, should have an interest in it until their respective claims for such services have been discharged. . . . That the owner's contract is made under and subject to the provisions of the existing lien law; that by virtue of the statute it operates as an irrevocable authority to the contractor to charge the land with liens for labor and materials employed in its improvement; that adequate provision is made for entire exemption therefrom by complying with the provisions of § 3 of the act,—together constitute a complete answer to all objections to the validity and justice of the lien law of 1878."

In *Bardwell v. Mann* (1891) 46 Minn. 285, 48 N. W. 1120, decided with reference to the act of 1889, which does not contain the provision found in the older act, by which the owner might have relieved his property from the attaching of liens by requiring his contractor to give a bond to pay all claims for work and material, the court rejected the con-

tention of counsel, that in *Laird v. Moonan, supra*, the validity of the older act was upheld merely because of this provision. The court remarked that: "The gist of the argument against the validity of both laws was and is that they charge property with liens in favor of subcontractors, laborers, and materialmen whom the owner has never employed, and with whom he has never contracted, and whose liens are not dependent upon the state of the account between him and his immediate contractor, and may, in the aggregate, far exceed the amount of the contract price."

With regard to the validity of the log lien law, see note 2, *supra*.

Missouri.—In *Henry & C. Co. v. Evans* (1888) 97 Mo. 47, 3 L.R.A. 332, 10 S. W. 868, the court held that the effect of the mechanics' lien law (Rev. Stat. 1879, §§ 3172 *et seq.*) is to give a lien to a subcontractor for materials furnished by him to the contractor and used in the construction of the building, notwithstanding the full contract price of the building has been paid, in good faith, by the owner to the contractor; and that this construction of the act did not bring it into conflict either with the provision of the state Constitution, which "secures to all the enjoyment of the gains of their own industry," or with the "due process" clause of the Federal Constitution. *Henry v. Hinds* (1885) 18 Mo. App. 497, was overruled.

Nebraska.—In *Ballou v. Black* (1887) 21 Neb. 131, 31 N. W. 673, a mechanics' lien law making the landowner liable, without regard to the state of the account between him and the contractor, was assumed to be valid.

Nevada.—For cases in which lien laws the effect of which was to make the landowner liable, without regard to the state of accounts between him and the principal contractor, were assumed to be valid, see *Hunter v. Truckee Lodge, No. 14, I. O. O. F.* (1879) 14 Nev. 24; and *Lonkey v. Cook* (1880) 15 Nev. 58.

New Jersey.—In *Gardner & M. Co. v. New York C. & H. R. R. Co.* (1905) 72 N. J. L. 257, 62 Atl. 416, the contention that, if the first section of the mechanics' lien law is so construed as to allow a lien for a debt due to any person further removed from the owner than the first subcontractor, it renders the act unconstitutional, as depriving the owner of his property without due process of

law, and interfering with his liberty of acquiring, possessing, and protecting property, was thus discussed: "The owner's right to hold and enjoy property must be subject to the general law of the state. He has no natural right to improve it by the construction of a building thereon without compensation to those who perform the labor and furnish the materials that enter into the improvement. And where the general law prescribes formalities whereby such laborers and materialmen may recover their compensation by means of a lien upon the property, unless the owner pursues the method that the statute prescribes for limiting the right of such lien to the party with whom he contracts, the presumption arises that his building operation is undertaken in full view of the general law, and the law enters into and becomes a part of his contract by his own consent. It has been repeatedly held that such a statute is not an undue restraint upon the owner's liberty of contract considered as an incident to the right of acquiring, possessing, and protecting property, and does not deprive him of his property without due process of law."

New York.—In *Blauvelt v. Woodworth* (1865) 31 N. Y. 285, where payments made to the contractor in advance of the time within which liens might be filed were held to have been made at the peril of the owner, and a sale of the premises by the owner, after the completion of the building, but before notice and within the time within which notice might be given, was held ineffectual to defeat the lien of the materialmen under Laws of New York of 1852, p. 611, chap. 384, the court said: "There is no provision of the Constitution which precludes the legislature from declaring a statutory lien, in respect to future contracts, in favor of either the contractor, the subcontractor, or the laborer, upon the land of the owner, at whose instance and for whose benefit the services are performed. The act of 1852 was in force when the contract in question was made; and every contract is presumed to be executed with reference to existing laws, and subject to such modification, in respect to the remedies of the parties, as may result from subsequent legislation, if free from constitutional objection." The same doctrine was again affirmed in *Glacius v. Black* (1876) 67 N. Y. 563. It had

been enunciated by one of the inferior courts before the earlier of these two decisions had been rendered. *Hauptman v. Catlin* (1857) 3 E. D. Smith, 666.

Ohio.—In *Palmer v. Tingle* (1896) 55 Ohio St. 423, 45 N. E. 313, the following remarks were made with respect to a statute which gave a lien for labor performed "by virtue of a contract with or at the instance of the owner or his agent, trustee, contractor, or subcontractor:" "No court can see that it is for the common public welfare that the liberty of contracts should be taken away from the owner of a building, to enable the seller of materials to collect their value from a man who never purchased them, and has already fully paid the one with whom he contracted for all that he has received. There can be no public necessity for making the contractor the agent of the owner, to enable the seller of materials to collect his pay from one who does not owe him, and with whom he has no contract. An agent can have no interest adverse to his master, but this statute attempts to create an agent for the owner out of the contractor, who is opposed to him in every interest. It is an attempt to make the contractor serve two masters, himself and the owner. This cannot be done. For this we have the highest authority. The owner has the right to acquire his building upon the best terms possible, and if he can, by making a contract to pay in advance, or by exchange of securities or other property, acquire his building cheaper than by contracting to pay after four months from its completion, he has the alienable right to so acquire it and to be protected in its enjoyment; and it is not within the power of the general assembly to compel him to pay a higher price for his building, for the protection of laborers and furnishes with whom he has no contractual relation." But this case has been disapproved by the Federal Supreme Court in a case where the Ohio statute was involved. See this note, *supra*.

Oregon.—In *Ainslie v. Kohn* (1888) 16 Or. 363, 19 Pac. 97, a mechanics' lien law giving a lien, regardless of payments made on the principal contract prior to the time when the law requires the claim of the subcontractor to be filed, was assumed to be valid.

Pennsylvania.—In *Waters v. Wolf*

(1894) 162 Pa. 153, 42 Am. St. Rep. 815, 29 Atl. 646, the validity of a mechanics' lien law of the ordinary type was taken for granted. The court remarked: "In the absence of an express contract against liens, with a statute before him giving a lien to those with whom his contractor contracted, the consent of the owner that a remedy given by law should be enforced under the contract to build was certainly to be implied."

As to the doctrine of this court, see further § 2818a, *post*.

Rhode Island.—In *Gurney v. Walsham* (1890) 16 R. I. 698, 19 Atl. 323, the constitutionality of a mechanics' lien law was affirmed upon the ground that the contract was made and entered into subject to its provisions. The defense that the owner had paid all that he owed the contractor before notice of claim of lien by materialmen was not sustained.

South Dakota.—In *Albright v. Smith* (1893) 3 S. D. 631, 54 N. W. 816, the validity of a mechanics' lien law resembling that of Minnesota was affirmed on the authority of *Laird v. Moonan* (1884) 32 Minn. 358, 20 N. W. 354 (see this note, *supra*). The court treated the lien as being enforceable within the limits of the contract price, irrespective of the state of the account between the principal employer and the contractor.

Tennessee.—In *Cole Mfg. Co. v. Falls* (1891) 90 Tenn. 466, 16 S. W. 1045, the provision in Acts Tenn. 1889, chap. 103, § 1, which gives a lien upon realty to "every journeyman or other person" who furnishes labor or material to an original contractor, to be used in putting improvements upon such realty under contract between him and the owner, was held not to be open to the objection that it provides for or allows the taking of property without due process of law, or the law of the land. The court thus discussed two of the objections made to the statute under review: "The second criticism, involving the proposition that the owner may be compelled to pay the subcontractor and materialman after he has already paid the original contractor, is true literally; but it is not true in the same sense that it ascribes to the statute a purpose of enforcing double payment. In other words, it is a fact that an owner who pays the original contractor within

thirty days after the completion of the work, building, or machinery may, upon notice given within that period, be forced to pay the subcontractor and materialman whom the original contractor unjustly fails or refuses to pay; but double payment does not follow as a necessary legal consequence in any case. In every instance the owner may fully protect himself by withholding the whole or a sufficiency of the price agreed upon from the original contractor until after the expiration of the thirty days, or he may see to it that the subcontractor and materialman are paid as the work progresses, or he may indemnify himself by bond, as prescribed in the 3d section of this act. It may be truthfully said that it will be inconvenient for the owner to adopt any one of these expedients, yet inconvenience of parties affected is never allowed to defeat a statute. The constitutionality of an act of the legislature cannot be successfully impeached upon the ground that it involves the citizen in mere inconvenience. Much more than inconvenience is involved for the subcontractor and materialman. Without the protection of such a law, they would be constantly exposed to the danger of an entire loss of labor and material. Hence, as a matter of pure wisdom and justice, there could be but little difficulty in choosing between the situation with such a law and that which would exist without it. A policy that would involve one class of citizens in mere inconvenience for the pecuniary safety of another class is far more wise and just than that which would suffer loss to the latter class rather than entail inconvenience on the former."

Washington.—In *Spokane Mfg. & Lumber Co. v. McChesney* (1889) 1 Wash. 609, 21 Pac. 198, a mechanics' lien law which the court construed as giving a lien to materialmen or laborers notwithstanding payment to the contractor in chief was held to be constitutional in respect to future transactions.

Wisconsin.—In *Mallory v. La Crosse Abattoir Co.* (1891) 80 Wis. 182, 49 N. W. 1071, the theory that the legislature has power to regulate future transactions was relied upon as a sufficient ground for affirming the validity of a law which gave to subcontractors a lien for the amount of their claims for labor performed or materials furnished

2817. Same subject further discussed.—A reason frequently assigned for the doctrine adverted to at the end of the preceding section is that the consent of the employer to the imposition of a lien upon his property in favor of persons rendering services or supplying material to the party with whom the agreement for the performance of the work is made may warrantably be implied on the ground that the law is conclusively presumed to form a part of all contracts made after its enactment.¹ On general principles, however, it is clear that the ante-

in or about a building, without regard to the contract price for the building or the sum due from the owner to the principal contractor, but which provided that the principal contractor should defend any suit to enforce such lien, and gave the owner a remedy over against him.

As to the log lien law, see note 2 *supra*.

¹ In *Bardwell v. Mann* (1891) 46 Minn. 285, 48 N. W. 1120, the court observed that such laws have been upheld upon the ground that, "while no man can be deprived of his property without his consent, and while the basis of the right to a lien against property is the consent of the owner, yet the contract of the owner with the contractor, made under and subject to the provisions of an existing lien law, is evidence of the authority of the latter to charge the property with liabilities incurred by him in performing his contract, and operates, by virtue of the statute, as authority to him to do so."

"The constitutional validity of such statutes securing liens to subcontractors, and others furnishing labor or material to a contractor, irrespective of the state of the account between the owner and the contractor, is well established; and it is established upon the ground that such statutes annex the lien as an incident to the contract of the owner with the contractor, such contract being the evidence of the authority of the contractor to charge the owner's property with liabilities incurred by him in performing his contract. *Jones, Liens*, § 1304," quoted in *Cole Mfg. Co. v. Falls* (1891) 90 Tenn. 466, 476, 16 S. W. 1045, where the court itself used the following language: "It is true that a lien is provided for persons with whom the owner is supposed to have no direct contractual relations, but that fact alone does not

invalidate the act; for the owner must be held to a knowledge of the existing law on the subject, and to the presumption that he employed the original contractor and gave out his work with reference to that law. The right of lien to subcontractors and materialmen is, by operation of law, incorporated into and made a part of the owner's contract as much as if expressly included and written therein. He contracts about a subject in which the law declares certain advantages to all persons concerned, whether by direct contract with him or by the employment of his contractor. The law declares that a lien shall exist in favor of the subcontractor and materialman in certain contingencies; hence, the owner who makes the contemplated contract cannot justly complain of the legal result, especially when he receives the benefit of the labor and material of those for whom the lien is provided and who often have no other means of compensation. The enforcement of this law does not necessarily result in loss to the owner, nor take from him some thing for nothing."

For other cases in which the same consideration has been stated to be the basis of the doctrine that enactments of this character are valid, see *Jones v. Great Southern Fireproof Hotel Co.* (1898) 30 C. C. A. 108, 58 U. S. App. 397, 86 Fed. 370; *Smith v. Neubaur* (1895) 144 Ind. 95, 33 L.R.A. 685, 42 N. E. 40, 1094; *Bohn v. McCarthy* (1881) 29 Minn. 23, 11 N. W. 127; *Laird v. Moonan* (1884) 32 Minn. 358, 20 N. W. 354; *Brown v. Markham* (1895) 60 Minn. 233, 30 L.R.A. 84, 62 N. W. 123; *Gardner & M. Co. v. New York C. & H. R. Co.* (1905) 72 N. J. L. 257, 62 Atl. 416; *Blauvelt v. Woodworth* (1865) 31 N. Y. 285; *Gurney v. Walsham* (1890) 16 R. I. 698, 19 Atl. 323; *Mallory v. La Crosse Abat-*

cedent passage of the law cannot, with propriety, be treated as a controlling element. This is apparent from the circumstance that it does not of itself furnish an adequate support for a statute which is for any reason adjudged to be beyond the powers of the legislature.² In no other connection has it even been suggested that the consent of a given person to be bound by the provisions of an unconstitutional enactment may be implied from the mere fact that he had entered into a contract of the description to which it was applicable. The unsoundness of such a theory has been taken for granted in those numerous cases in which the invalidity of statutes of various kind has been assumed to be a good defense to actions brought for the enforcement of contracts.

The validity of lien laws must, therefore, like that of other statutes, be determined with reference to some other criterion than the circumstance of its having come into operation before the contract for the work in question was made. An enactment of this type is perhaps most satisfactorily sustainable upon the ground of its being a proper exercise of the police power for the protection of a large class of persons who, as experience has shown, are exposed in a special degree to the risk of losing their remuneration, if they have no more

toir Co. (1891) 80 Wis. 182, 49 N. W. 1071.

² The correct doctrine clearly is that which is embodied in the statement of the court in *Palmer v. Tingle* (1896) 55 Ohio St. 423, 45 N. E. 313, that, "if the statute is valid it must be read into the contract, but if invalid it binds neither party, and does not become a part of the contract." In another part of the opinion the court remarked that "an unconstitutional statute cannot enter into a contract without the assent of the parties." By "assent" is clearly meant "express assent." The conclusion of the court that the statute under review was invalid was disproved by the Federal Supreme Court. See §§ 2816, note 3, *ante*.

But soundness of the general rule formulated in the above passages is unquestionable.

In fact that rule has been recognized in the states in which, more frequently than in any other, the ground for predicated validity which is mentioned at the beginning of this section has been adverted to. In *Meyer v. Berland* (1888) 39 Minn. 438, 1 L.R.A. 777, 12 Am. St. Rep. 663, 40 N. W. 513,

the court, after stating its view with regard to the unconstitutionality of the provision mentioned in § 2818d, *post*, continued thus: "It is no answer to this objection to say that all encumbrances or other interests in property, acquired subsequent to the passage of the act, must be deemed as taken subject to the provisions of the law, which enter into and form a part of the contract. This rule, which is a familiar one, always presupposes that the law is valid. It is no more in the power of the legislature to pass a law taking from a man, without his consent and without process of law, property which he may thereafter acquire, than it is to pass a law depriving him of property which he had acquired before its passage. The statement in the text is also sustained by the following remark in *Belcher v. Orphan House* (1822) 2 M'Cord, L. 23, where the validity of an apprenticeship law was under discussion: "If for instance, an act be manifestly repugnant to the Constitution, the parties are not supposed to contract in reference to the act, but in reference to the Constitution as the paramount law."

effective remedy than a suit against their immediate employers. This would seem to be perfectly adequate reason for holding them to be within the scope of the legislative power. But it is difficult to avoid the suspicion that, if the question of their validity had been first raised within the last twenty-five years,—the period during which the courts, in dealing with statutes which affect the contract of employment, have leaned strongly against all restrictions of the right of contract other than those which are designed to promote the health and safety of servants,—the trend of the decisions might have been less favorable to lienors than that which is indicated by the cases cited in the preceding section.

2818. Same subject further discussed. Validity of some special provisions.—*a. Express waiver of lien by contractor.*—Three courts have pronounced against the constitutionality of statutes which purported to subject the property of the principal employer to a lien in favor of employees of the contractor, although the contractor might have agreed to waive his right to a lien.¹ But it may also be contended, with some apparent plausibility, that enactments of this tenor

¹ In *John Spry Lumber Co. v. Sault Sav. Bank Loan & T. Co.* (1889) 77 Mich. 199, 6 L.R.A. 204, 18 Am. St. Rep. 396, 43 N. W. 778, the court thus stated its reasons for annulling a statute which contained a clause to the effect that the lien should not be defeated by any contract between the owner, etc., of the land, and the original or any subcontractor in case the person performing the labor should comply with the provisions of the statute: "This statute is made for the express, and, so far as differing from former laws, for the only, purpose of enabling strangers to the title to subject it to sale for obligations to which the owner never became bound, and in which he has no part whatever. It strikes at the foundations of all property in land. There is no constitutional way of divesting a man's title except by his own act or default. Here his own act is not required, and his freedom from default is no defense. He may pay in full, in advance or otherwise, for all he has contracted for. He may contract for a house built in a certain way, and of certain materials, and may have to pay for what he never bargained for, and what his building contractor had no right to put off upon

him. The original contract plays no part in the matter, except as a fact which binds no one, and has no significance. Such a gross perversion of all the essential rights of property is so plain that no explanation can make it plainer." This decision was followed in *Mellis v. Race* (1889) 78 Mich. 80, 43 N. W. 1033; and *Snell v. Race* (1889) 78 Mich. 334, 44 N. W. 286.

In *Taylor v. Murphy* (1892) 148 Pa. 337, 33 Am. St. Rep. 825, 23 Atl. 1134, the court made the following remark: "The contract between the owner and the contractor is the source from which the right of the subcontractor is derived, under the provisions of the law, and it is self-evident that a stream cannot rise higher than its source. The agreement of the builder to provide all the labor and materials for the erection of a building, and look for his security solely to the personal responsibility of the owner, leaving the building unencumbered by liens, is a valid and binding one. It violates no rule of public policy. A statute that should disregard its obligation, and authorize the entry of a lien for work or materials, in violation of its terms, would seem to be within the prohibition of the Constitution, art. 1, § 17, which declares that no law impairing the obligation

should be sustained on the ground that they are simply intended to preclude the formation of a class of contracts which might conceivably be made the means of reducing mechanics' lien laws to a dead letter so far as regards persons that do not deal directly with the principal employer. The doctrine that the legislature has power to give such persons a lien upon the property of the principal employer may not unreasonably be considered to involve the corollary that it has also the power to render the lien more effective by declaring that

of contracts shall be passed. It might also be within the limitation on the powers of the several states, found in art. 1, § 10, of the Constitution of the United States."

In *Waters v. Wolfe* (1894) 162 Pa. 153, 42 Am. St. Rep. 815, 29 Atl. 646, it was held that § 2 of the Pennsylvania act of June 8, 1891, P. L. 225, which required the written consent of the subcontractor in order to bind him by a stipulation in the contract between the original contractor and owner, that no mechanics' lien should be filed, was unconstitutional, in that it attempted to create a debt and give a lien therefor, against the express covenant in the contract; and that § 2 of the act, providing that the contractor should be the agent of the owner in ordering work or materials, and that any subcontractor doing work or furnishing materials should be entitled to a lien notwithstanding any stipulations to the contrary in the contract between the owner and the contractor, unless such stipulation should be consented to by said subcontractor, was unconstitutional in that it attempted to frame a new contract and substitute it for the one made by the parties. The opinion was expressed that the indefeasible right to acquire and possess property, secured by article 1, § 1, of the Constitution of Pennsylvania, necessarily includes the right to make reasonable contracts for the improvement of property; and that a contract providing that no mechanics' lien shall be filed is not unreasonable as to either contractor or subcontractor. This decision was followed in *McMaster v. West Chester State Normal School* (1894) 162 Pa. 260, 29 Atl. 734.

In *Kelly v. Johnson* (1911) 251 Ill. 135, 140, 141, 36 L.R.A.(N.S.) 573, 95 N. E. 1068, the court thus discussed the validity of Illinois mechanics' lien law 1903 (Starr & C. Anno. Stat. Supp.

1903, chap. 82, § 21), which provides that every mechanic or other person who shall furnish any labor or materials for any contractor shall be known as a subcontractor, and shall have a lien for the value thereof on the same property as provided for the contractor, whether or not the original contractor could have obtained a lien or was by contract or conduct divested of the right to a lien: "The lien of a subcontractor can only exist by virtue of the original contract, and in case the original contract provides there shall be no lien on the improved property for material and labor furnished by the original contractor, such contract is binding upon a subcontractor; and a subcontractor, when a lien has been waived in the original contract, has no lien for material or labor. *Williams v. Rittenhouse & E. Co.* (1902) 198 Ill. 602, 64 N. E. 995; *VonPlaten v. Winterbotham* (1893) 203 Ill. 198, 67 N. E. 843. The right to modify a contract as between the original parties, so long as there are no intervening rights, involves the exercise of the same power as does the execution of the original contract. The section of the statute heretofore referred to, we think, in so far as it attempts to give a subcontractor a lien when the original contract waives all liens, or all liens have been thereafter released by the contractor, is clearly unconstitutional, as its enforcement against an owner, where the original contractor has waived all liens, or all liens have been released subsequent to the date of the contract, would be to deprive the owner of his property without due process of law, as it would prevent the owner from making such contract with reference to his property as he might see fit. The right to contract is clearly a property right; and if the legislature should pass a statute which would provide that the owner of

the remedial right granted shall not be forfeited without their own consent. The view thus suggested is strongly supported by the analogy of the cases in which the courts have affirmed the constitutionality of enactments which invalidate contracts under which the benefits of an "anti-screening law," (see § 2821, *a, post*), are waived by miners, or employers are released from a certain liability to which they have been subjected by the legislature in respect of injuries sustained by their servants (see § 2859, *post*).

b. Failure of landowner to disclaim responsibility in respect of work known to be in progress.—The constitutionality of provisions to the effect that where buildings are constructed or improvements made upon land with the owner's knowledge his interest shall be subject to the lien unless, within a specified period, and in the manner prescribed, he gives notice that he will not be responsible in respect of the work done, has been sustained against the objection that it permits a lien to attach without the consent of the owner. The *ratio decidendi* was that such a provision merely prescribes what shall be evidence of the owner's consent.²

land should be powerless to make a contract for the erection of a building thereon which should be relieved from all liens for the material and labor which the original contractor should put into the building in its erection, the effect of such act would be to deprive the owner of the right to contract with reference to the erection of such building upon such terms as he might deem to be for his best interests,—that is, of the right to make a contract for the erection of a building whereby a contractor would agree to look solely to the individual responsibility of the owner for his pay, which would be, in part, to deprive the owner of full dominion over his property. . . . Permitting the owner of real estate to retain the right to contract with reference to his property when making improvements thereon does no injustice to the subcontractor, as such contractor can fully protect himself from loss by informing himself of the terms of the contract which exists between the original contractor and the owner of the property to be improved, before he contracts with the original contractor; and if the terms of the contract are not satisfactory to the subcontractor, he may refuse to contract with the original contractor to furnish material or to per-

form labor in the improvement of the property."

²In *Wheaton v. Berg* (1892) 50 Minn. 525, 52 N. W. 926, the court stated its position as follows: "It is to be taken as a premise, not now to be controverted, that laws which subject the property of a person to liens for improvements made thereon by another can only be sustained upon the theory that the owner has consented thereto; and hence the circumstances must be such as to show consent, or to justify an inference of it. *Meyer v. Berlandi* (1888) 39 Minn. 438, 1 L.R.A. 777, 12 Am. St. Rep. 663, 40 N. W. 513, and cases cited. It is not necessary that express consent be shown. It may be inferred from mere silence and nonaction on the part of the owner, when the circumstances are such as to make it obviously his duty to speak or act if he would avoid the imputation of consent. This statute undertakes to regulate, as may be done within proper limits, the conduct of the landowner who knows that buildings are being erected on his land. Those who may be engaged in contributing labor or material which go to the improvement of the land may often have reason to suppose that the work is being carried on at the instance or with the consent of the

On the other hand, an enactment declaring that the fact that the person performing labor was not enjoined by law from performing

landowner. It is important to such persons that, if possible, it be made known then if the owner's consent be wanting, and that, therefore, they cannot subject the property to liability for the labor or material supplied by them for its improvement. Hence the statute, in effect, makes it the duty of the owner, who knows of the improvement being made, to give the prescribed notice if he would avoid the inference that it is done with his consent. From the neglect of the duty created by statute, the inference follows. But it would seem to be impossible to construe this provision as making the mere neglect to give the specified notice conclusive upon the landowner in all cases. The circumstances must be such that he can comply with the statutory requirement, or he cannot be thus concluded. It is beyond the power of the legislature to subject one's property to such a liability by reason merely of his failure to perform specified act arbitrarily prescribed by statute, if the circumstances are such as to render performance impossible. Consent cannot be conclusively implied from mere silence, when the circumstances are such that dissent is impossible; and the law must be construed with reference to such a state of facts, for it is not unlikely to occur. Suppose, for instance, that a landowner is informed that some stranger is building a house on his land, he being at the time at such a distance from the premises or so situated that it is impossible for him to give the prescribed notice of his dissent within the five days allowed by statute therefor; or that, directly after being informed of such fact, he becomes incapable of acting by reason of insanity or sickness; or that he is an infant of such an age that no legal responsibility can rest on him. Other illustrations may readily be supposed. Such cases are not excepted from the terms of the statute, which are comprehensive and general. It would be difficult to construe the statute as not applying to such cases. It was enacted as a law; and the question whether it is applicable or not to any particular case cannot well be left to be determined by the fact as to whether, in that particular case, the requirement respecting the

giving of notice could have been complied with. But it would be gross injustice in such cases as have been supposed to conclusively hold the landowner to have consented to the wrongful acts of a stranger, and hence to have submitted his property to liability for the debts of another, merely because he failed to do what it was physically impossible for him to do. So construed, the law could not be sustained, for it would deprive the owner of his property without due process of law, allowing a mere stranger, by his own wholly wrongful act, to encumber the property, the owner being powerless to prevent it by reason of the impossibility of complying with an arbitrary requirement of the statute. But some reasonable effect should be given to the statute if it be possible; and this may be done by construing the statutory presumption, which springs from the failure to give notice, as being of a *prima facie* nature rather than conclusive, and as imposing upon the landowner who, knowing the fact of the improvement, has failed to give the prescribed notice, the burden of relieving himself from the statutory imputation of having consented to what was being done, by proof of his inability to give the prescribed notice of his dissent, and that in fact the improvement was made without his authority or consent. As the statute was obviously intended to establish a rule of evidence, and as it cannot be sustained if the statutory presumption is to be construed as conclusive, but may be if it has the qualified effect which we have suggested, we conclude that it must be so construed." This decision was followed in *Title Guarantee Co. v. Wrenn* (1899) 35 Or. 62, 76 Am. St. Rep. 454, 56 Pac. 271. In *West Coast Lumber Co. v. Newkirk* (1889) 80 Cal. 275, 22 Pac. 231, and *Harlan v. Stuffbeem* (1891) 87 Cal. 508, 25 Pac. 686, the court took for granted the validity of a provision under which the property of the principal employer was subjected to a lien in respect of work performed thereon without his antecedent authority, if, after having been informed that the work was in progress, he failed to give notice of his dissent.

it by the person in whom the title was vested at the time shall be conclusive evidence that such labor was performed with the consent of the latter person, has been pronounced unconstitutional as depriving him of his property without due process of law.³

A less stringent provision under which the fact that the person performing labor or furnishing materials was not notified in writing not to perform such labor or to furnish such material, by the person in whom the title was vested at the time such labor was performed or such materials furnished, was declared to be "prima facie evidence that it was by and with the consent of the owner that such labor was performed and materials furnished," has also been held invalid on the ground that it interfered with the full right to enter into contracts, imposed burdens, and created encumbrances never assumed, directly or indirectly, and operated to deprive the owner of his property without due process of law.⁴

c. Payment of liens in money.—The provision in § 1184 of the California Code of Civil Procedure, requiring that "as to all liens, except that of the contractor, the whole contract price shall be payable in money," has been declared to be an unwarrantable invasion of the right of contract.⁵

³ *Meyer v. Berlandi* (1888) 39 Minn. 438, 1 L.R.A. 777, 12 Am. St. Rep. 663, 40 N. W. 513, (Laws, 1887, chap. 270, § 3). The court said: "As liens are an encumbrance upon the owner's property, it is fundamental that they can only be created by his consent or authority. No man can be deprived of his property without his consent or by due process of law. The basis of the right to enforce a claim, as a lien against property, is the consent of the owner, and it is upon this principle alone that laws giving liens to subcontractors are sustained. The contract of the owner with the contractor is, under the law, the evidence of the authority of the latter to charge the property with liabilities incurred by him in performing his contract." After quoting the provision under review, the court pointed out that its effect was that "if a wilful trespasser should go upon the land of another against his will or without his knowledge, and erect a building on it, and the owner of the land did not institute a suit, give bonds, and get out an injunction against the trespasser, he would be conclusively deemed to have consented to the erection of the build-

ing, and his land be subject to a lien in favor of the trespasser, although the owner might be entirely ignorant of the trespass until after the building was erected. The bare statement of such a proposition is sufficient. A man cannot be thus deprived of his property without his consent. The legislature may doubtless establish rules of evidence, but to enact a law making evidence conclusive which is not so necessarily in and of itself, and thus preclude a party from showing the truth, would be nothing short of confiscation of property and a destruction of vested rights without due process of law."

⁴ *Randolph v. Builders & Painters' Supply Co.* (1894) 106 Ala. 501, 17 So. 721.

⁵ *Stimson Mill Co. v. Braun* (1902) 136 Cal. 122, 57 L.R.A. 726, 89 Am. St. Rep. 116, 68 Pac. 481, The court said: "The provision in the Constitution respecting mechanics' liens (art. 20, § 15) is subordinate to the Declaration of Rights in the same instrument, which declares (art. 1, § 1) that all men have the inalienable right of 'acquiring, possessing, and protecting property,' and in § 13 that no person shall be de-

d. Priority of laborers' claims relatively to those of other creditors of the principal employers.—The provisions in the Minnesota mechanics' lien law of 1887, which declared that, on a sale under a lien, the deed of the sheriff should take precedence of any other title, and that a mechanics' lien should take precedence of prior encumbrances, were pronounced unconstitutional.⁶

e. Priority of laborer's claims relatively to those of other creditors or contractors.—On the ground that the effect of the clause in art 20, § 15, of the California Constitution, declaring that mechanics, ma-

prived of property without 'due process of law.' The right of property antedates all Constitutions, and the individual's protection in the enjoyment of this right is one of the chief objects of society. He has the right to enjoy his property and improve the same according to his own desires in any way consistent with the rights of others, subject only to the just demands of the state. This right is invaded if he is not at liberty to contract with others respecting the use to which he may subject his property, or the manner in which he may enjoy it. The legislature may prescribe the form in which contracts shall be executed in order that they may be valid or binding, but it cannot limit the right of parties to incorporate into their contracts respecting property, otherwise valid, such terms as may be mutually satisfactory to them. A statute declaring invalid any contract by the owner of real property, for the construction of a building thereon, unless it is provided therein that the contract price shall be payable only in money, is unconstitutional in that it is an infringement upon the right of the owner in the possession and enjoyment of his property. The legislature could, with equal right, declare that all contracts for the sale of merchandise, or for the manufacture of machinery, or for the employment of artisans, should be invalid unless they should provide that the payment thereunder should be made only in money. The right of the owner of land to contract with a builder for its improvement and to compensate him therefor with other real property, or with personal property other than money, is the same, and as inalienable as the right of the owner of any other property to contract respecting the payment for any improvement thereof."

⁶ *Meyer v. Berlandi* (1888) 39 Minn. 438, 1 L.R.A. 777, 12 Am. St. Rep. 663, 40 N. W. 513. The court said: "This is a manifest attempt to displace all prior encumbrances upon, and vested interest in, the property, or at least to postpone them to liens under the statute subsequent in time, so that, for example, a mortgagor and a materialman or laborer, as a result of some arrangement between themselves, without the knowledge or consent of the mortgagee, might improve him out of his prior lien on the premises. Seeing the possible objection to this, counsel for one of the defendants takes the position that the act does not give a lien on the land, but only the building, and that it is only the latter that is to be sold. But in placing such a construction upon the law he only escapes Scylla to encounter Charybdis. To sell the building without the land would almost entirely destroy the security which the legislature designed for the protection of lien holders. We fail to see what the purchaser could do with the building, unless it would be to tear it down and remove the rubbish. If the building alone were sold, he would have no right to a foot of the land on which it stood. The title to real estate would be infinitely perplexed if one person owned the structure and another the land. Such a construction is entirely impracticable, and, if adopted, the law would be virtually incapable of execution. Hence, although the act is silent as to the land, it must be construed to include, as subject to the lien, that extent of ground, appurtenant to the building, which is reasonably necessary for its enjoyment. Such is the uniform construction of lien laws, even where there is no express statutory authority for charging the land."

terialmen, artisans, and laborers of every class, etc., shall have a lien for labor or material furnished, is to place on equality the liens of all the descriptions of persons thus specified, it has been held that the provision in Code Civ. Proc. § 1194, which fixes the relative rank of liens, is void in so far as to purport to give the liens of persons performing manual labor a priority over those of materialmen.⁷

f. Contractor's bond.—The provision in the California Code of Civil Procedure, § 1203, requiring a building contract to be accompanied by a good and sufficient bond in an amount equal to at least 25 per cent of the contract price, for the benefit of any and all persons who perform labor or furnish materials to the contractor, and providing that a failure to comply with such requirement shall render "the owner and contractor jointly and severally liable in damages to any and all materialmen, laborers, and subcontractors entitled to liens upon property affected by said contract," has been pronounced invalid, as unreasonably restraining the owner in regard to the use of his property, and also as being an unreasonable and unnecessary limitation of his power to make contracts.⁸ It was laid down that such a provision could not be sustained as a regulation within the police power, since it is not calculated, and was not intended, to conserve the safety, health, or general welfare of the community.

The section in the Tennessee statute under which a landowner who has been compelled to pay his contractor's employees in discharge of their lien on the property is permitted to take judgment over against the contractor upon his indemnity bond upon mere motion has been pronounced valid, on the ground that although notice to the contractor of this motion is not expressly provided for in the act, it is required by necessary implication."⁹

g. Removal of principal employer's property by laborer.—In one of the sections of the mechanics' lien law of Tennessee it is declared that every mechanic, etc., may, after giving ten days' notice to the owner of his purpose to do so, remove all "such property or the parts of the same on which his labor is performed, or materials, machinery, or other property was used," at the request of a contractor for the owner's benefit, when such improvements have been made upon the

⁷ *Miltimore v. Nofziger Bros. Lumber Co.* (1907) 150 Cal. 790, 90 Pac. 114, followed in *Stimson Mill Co. v. Nolan* (1907) 5 Cal. App. 754, 91 Pac. 262.

⁸ *Gibbs v. Tally* (1901) 133 Cal. 373, 60 L.R.A. 815, 65 Pac. 970. For cases in which bonds given in pursuance of this enactment were held void, see

Shaughnessy v. American Surety Co. (1903) 138 Cal. 543, 69 Pac. 250; *San Francisco Lumber Co. v. Bibb* (1903) 139 Cal. 193, 72 Pac. 964; *Montague v. Furness* (1904) 145 Cal. 205, 78 Pac. 640.

⁹ *Cole Mfg. Co. v. Falls* (1891) 90 Tenn. 466, 16 S. W. 1045.

lands of a married woman, or other persons under disability, or upon trust estates, or upon lands held by other superior title or subject to prior liens, and the mechanic, laborer, or furnisher was ignorant of the state of the title, and the true owner refuses to recognize the lien or claim for the materials furnished or labor performed. This provision has been held to have reference to a removal made not by the mechanic, etc., himself, in any matter that to him may seem best, but in pursuance of the judgment of a court and with due regard to the interest of the owner and other persons concerned. It was pronounced valid when construed in this sense.¹⁰

h. Failure of contractor to pay laborers.—The provisions in the Minnesota statute by which the mere failure of a contractor who has received what is owed by the principal employer, to satisfy the claims of his laborers, is declared to be a felony punishable by imprisonment, have been pronounced invalid.¹¹

i. Construction of statute.—The section of the Minnesota mechanics' lien law of 1887, which provided that, when any doubt existed as to the construction of the law, it should be the duty of the court to construe it so as to give the person performing any labor the full amount of his claim, over and above costs and attorneys' fees, was held to be unconstitutional, as being an invasion of the functions of the judiciary.¹²

2819. Enactments rendering principal employers personally liable for the wages of laborers hired by contractors.—Enactments imposing upon railway companies a liability for the wages of laborers employed by contractors have been held to be a valid exercise of the

¹⁰ *Cole Mfg. Co. v. Falls* (1891) 90 Tenn. 466, 16 S. W. 1045. (Acts 1889, chap. 103, § 2).

¹¹ *Meyer v. Berlandi* (1888) 39 Minn. 438, 1 L.R.A. 777 12 Am. St. Rep. 663, 40 N. W. 513 (Laws 1887, chap. 270, § 3). The court said that this provision, "if not unconstitutional on other grounds, is clearly repugnant to § 12, art. 1, of the Constitution of the state, prohibiting imprisonment for debt. It is not necessary that a contractor be guilty of any fraud or other tort in order to subject him to the penalties of this section. If he has received his pay from the owner of the property, and owes a debt due on contract to one of his laborers or materialmen which he is unable to pay, he is guilty of obtaining money on false pretenses, and liable to imprisonment in the peniten-

tiary. No matter how honestly he may have paid over the last dollar which he has received on his contract, yet if, through honest mistake he took the job too cheap, or if by unforeseen accident it cost more than he anticipated, and for that reason he cannot pay all that he owes for labor or material, he is a felon. This is returning with a vengeance to the old barbarous fiction upon which imprisonment for debt was originally based, *viz.*, that a man who owed a debt, and did not pay it, was a trespasser against the peace and dignity of the Crown, and for this supposititious crime was liable to arrest and imprisonment. Such a statute cannot be sustained for a moment."

¹² *Meyer v. Berlandi* (1888) 39 Minn. 438, 1 L.R.A. 777, 12 Am. St. Rep. 663, 40 N. W. 513.

police power. The particular consideration which, in this point of view, has been relied upon, is that they are calculated to prevent pauperism and breaches of the peace.¹ It has also been laid down that they are not unconstitutional, as involving a confiscation of property,² or as impairing the obligation of contracts.³

¹ *Branin v. Connecticut & P. River R. Co.* (1858) 31 Vt. 214. The court thus adverted to the causes in which the statute in question (Vt. Gen. Railroad Law, § 60) had its origin: "Large numbers of poor day laborers, generally foreigners, were employed in building the railroads. By the failure of contractors they were often deprived of their earnings of employment and of all means of subsistence for themselves and their families. The towns along the lines of the railroads became chargeable for their support as paupers, and thus were subjected to heavy burdens. Applications were made to the legislature to modify the poor laws so that the state should bear these unusual expenses. Thus, the prevention of the pauperism, growing out of the prosecution of these railroad enterprises, became a subject of legislative action. Nor was pauperism the only evil. The laborers, feeling that they had been wronged, ignorant of all means of redress, sought to retaliate for their wrongs upon the contractors, the railroad companies, and even upon the community. Riots and breaches of the peace ensued, attended with danger to life and property. These evils seemed to flow directly from the necessary employment of such laborers upon these great works. The remedy was simple, —to secure to the laborers pay for their work. Hence the enactment of this statute. It was made to prevent pauperism and breaches of the peace,—evils which no person, natural or artificial, can by contract acquire a right to inflict upon the community without restraint from legislative control. And where, as in this case, the exercise of this control subjects the corporations to no pecuniary expense, and rather aids, than hinders, the prosecution of their enterprises and the enjoyment of their privileges, there seems to be no ground whatever for questioning its legality."

² *Peters v. St. Louis & I. M. R. Co.* (1856) 23 Mo. 107; *Grannahan v. Hannibal & St. J. R. Co.* (1860) 30 Mo. 546.

In *Kansas City use of Kansas City Hydraulic Press Brick Co. v. Youmans* (1908) 213 Mo. 151, 112 S. W. 225, it was held to be "clear" that no constitutional provision was violated by Kansas City charter, art. 9, § 20, which provides that "contracts for making city improvements on streets, etc., shall contain a covenant on the part of the contractor, or contractors with the city, to pay for the work and labor of all laborers and teamsters, teams and wagons employed on the job and for all materials used therein, and performance of such covenant to be guaranteed by two or more sureties signing the contract, whose sufficiency shall be approved as provided by ordinance, but who shall not be liable beyond the estimated cost of the materials used and labor done upon the job, to be stated in the contract: Provided, that the city shall not be liable for the sufficiency of the contractors or sureties, nor for any failure to comply with or irregularity in complying with this provision." The particular grounds upon which this provision was attacked are not stated in the report.

³ In *Branin v. Connecticut & P. River R. Co.* note 1, *supra*, the court, after laying it down that the clause which forbids the passage of laws "impairing the obligation of contracts" prohibits the taking away or impairing any of the essential franchises of a corporation, proceeded thus: "The only essential franchise with which the statute can be supposed to come in conflict is the right to build a road. The act substantially provides that if the company employs contractors to build its road, it must be liable to the day laborers employed by the contractors for labor actually performed on the road, within forty days before notice in writing to the engineer, of such claim of the laborer. Does this provision impair the right to build the road? Is the corporation deprived of any necessary means of building the road by being subjected to the liabilities of this law? It does not appear but that the railroad

2820. Truck acts and other enactments designed to insure the payment of the full amount of the wages earned.—The cases decided by the state courts, under this head are conflicting. So far as regards those in which the enactments involved were held to be invalid, it seems clear that, in view of the doctrines announced by the Federal Supreme Court in subsec. m, *infra*, they cannot be considered sound precedents, in so far as they proceeded upon the broad theory of legis-

company could build their road by the action of their own officers and agents, the use of their own funds, and the direct employment of laborers, without the intervention of contractors. Clearly this could be done. It is not manifest that the letting and subletting of the construction of the road to contractors and subcontractors is either necessary or even profitable. If the company can build the road without the intervention of contractors, the statute cannot be said to conflict with the privilege of building the road. It would be simply inoperative upon the power granted for that purpose. . . . Even if the intervention of the contractors was a necessary means to the building of the road, we cannot consider that the act would be such an obstacle to the making of contracts as would hinder the company in the successful construction of their work. Both the company and the contractors must expect to pay the day laborers. The fund from which they are to be paid comes from the corporation. The supervisory power so amply retained by such corporations in ordinary railroad contracts for construction, and their rights, as usually specified, to retain funds to await the final completion of the work by contractors, show that provisions similar to those required by the statute would not have been held objectionable in the making of such contracts. On the contrary, when incorporated in such contracts they would doubtless be decidedly beneficial in the successful prosecution of such works. . . . The objection to making the company liable for work done by the laborers is, that the company contract only with the contractors, not with the laborers; and that to hold them liable to the laborers is to bind them by contracts to which they have not assented. In weighing this objection, it is to be considered, 1st, that the statute does not bind the

corporation to past contracts. It applies only to contracts made and work performed after the passage of the act. 2d, that the legislature, by the act, does not make any contract for the corporation, or authorize anyone to bind the corporation without its assent. It merely imposes a restriction in regard to its making contracts for building the road. It establishes by general law a privity and liability between the corporation and the laborers, which the corporation is bound to have in view in making contracts, which does not in the least impair power to build their road, and in regard to which they can secure themselves from loss. The exercise of this power, so far as it is intended as a security to the laborer, grows out of the peculiar nature of these railroad enterprises, of the employment of large numbers of poor and ignorant laborers, generally foreigners, of their liability to be deprived of the means of subsistence by the failure of contractors, and, their ignorance and inability to secure themselves. It would seem to be clearly within the appropriate duties of government to protect those who are so little able to protect themselves, and, by a general law, to provide securities for them according to the equity of their claims and the necessities of their situation. It is upon this principle that domestic servants and others in relations of dependence and confidence are often made preferred creditors in statutes which provide for distributing the property of insolvents. If we were to regard the law, therefore, merely as imposing a liability for the security of laborers, we should hold it constitutional."

For other cases in which such similar statutes were held to be valid in respect of contracts made after their passage, see *Hart v. Boston, R. B. & L. R. Co.* (1877) 121 Mass. 510; *Streubel v. Milwaukee & M. R. Co.* (1860) 12 Wis. 67.

lative incompetency to restrict the right of contract.¹ But the annulment of the provisions under discussion may, in some instances, at least, have been justifiable on the ground of an unlawful discrimination in respect of the classes of employers affected.

a. Arkansas.—The enactment which provides that all firms, companies, and corporations which issue any evidence of indebtedness to pay for labor shall, upon demand, redeem it in lawful money, has been declared to be, so far as corporations are concerned, a reasonable exercise of the power reserved by the state Constitution, to alter, revoke, or annul any charter of incorporation.² In the case cited, the provisions excluding from the operation of the act coal mines employing not less than 20 men were held to be an unlawful discrimination which rendered the act wholly void. But this doctrine is inconsistent with that applied in a case decided by the supreme court of the United States with reference to a similar limitation in another description of statute.³

b. Colorado.—The supreme court of this state had declared, in response to interrogatories submitted by the senate, while a bill relating to the subject was under consideration, that, in the exercise of the police power, laws forbidding employers to pay their employees in scrip payable or redeemable otherwise than in money, or to pay wages in goods or supplies at higher prices than reasonable or current market value, may be enacted when they are necessary to prevent oppression and fraud.⁴

c. Illinois.—The provision in the truck act by which it is declared to be lawful for a person or corporation engaged in mining or

¹ See especially the subsections which deal with the Illinois, Missouri, and Pennsylvania cases.

² *Union Sawmill Co. v. Felsenthal* (1908) 85 Ark. 346, 108 S. W. 217 (act of May 23, 1910). The court said: "The legislature cannot take from them [corporations] the right to contract; for it is essential to their existence. It can regulate it, when the interest of the public demands it, but not to such an extent as to render it ineffectual, or substantially impair the object of its incorporation. The Constitution of this state, in reserving the right to amend or repeal, expressly provides that it may be exercised whenever, in the opinion of the legislature, the charter 'may be injurious to the citizens of this state; in such manner, however, that no injustice shall be done to the corporators.'"

³ See *McLean v. Arkansas* (1908) 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206, § 2821, note 2, *post*.

⁴ *Re Scrip Bill* (1897) 23 Colo. 504, 48 Pac. 512. The following remarks were made in the course of the opinion: "We may properly take cognizance of the fact that the most serious disturbances which have occurred in this country for the last twenty-five years have grown out of controversies between employer and employee. No one doubts the authority or questions the duty of the state to interfere with such force as may be necessary to repress such disturbances and maintain the public peace and tranquility; and as well may the state provide in advance against certain kinds of fraud and oppression which lead to these outbreaks."

manufacturing to be engaged or be interested in keeping or controlling any "truck store" has been held to violate the constitutional guaranty that no person shall be deprived of life, liberty, or property without due process of law.⁵

⁵ *Frorer v. People* (1892) 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395 (act of May 28, 1891). The keeping of a truck store by a person engaged in other kinds of business was, it was pointed out, in substance the same thing as the keeping of such a store by a person carrying on the business of manufacturing. The court then proceeded as follows: "The purpose is, manifestly, the same in each case,—namely, the sale by the employer to the employee of the articles designated; and it requires precisely the same elements to constitute a contract, including mental capacity in the parties contracting, and freedom from fraud and overreaching, in one case as it does in the others.

"The operator of a mine and the manufacturer have no other control over the employee than that which may result from employing him or continuing him in employment, or refusing to do so, and every other employer of labor has precisely the same control over those who obtain, or wish to obtain, employment with him. There can be no reason why the miner or the operative in the manufactory will be more or differently influenced by his hopes and fears in these respects than will laborers in other industries. Mining and manufacturing are indispensable branches of industry, and as honorable as any others. There is nothing in operating mines or manufactories to render the individuals employed therein less capable to contract, or to give the employer greater wisdom and adroitness therein, than if they were engaged in operating and controlling, respectively, some other branch of industry. It may be conceded that there is more of dependence of the employee upon the employer in case of skilled labor, in a special department,—because the demand for such labor is limited in each locality by the number and size of its industries,—than there is in the case of the general laborer, who may find employment anywhere and everywhere. But mining and manufacturing do not include all the skilled labor in the country. In constructing roads, in

building houses, in the business of commerce, including buying, selling, and transportation, and in other branches of industry, a vast number of skilled laborers are constantly employed, and their relations to their employers would seem to be under precisely the same conditions as are those affecting the relations between operators of mines and manufactories and their employees. And, in any view, the extent and degree of dependence in particular classes of industries cannot affect the general principle, since, human nature being the same in all classes of industry, the effect of equal degrees of dependence must be the same in each class.

"It cannot truthfully be said that all operatives in mines or manufactories are more dependent upon their employers than are all laborers in any other branch of industry. . . . In all that relates to mining and manufacturing wherein they differ from other branches of industry, we recognize the supremacy of the general assembly to determine whether any, and, if any, what, statutes shall be enacted for their welfare and that of operatives therein, and necessarily affecting them alone. But keeping stores and groceries, or supplies of tools, clothing, and food, by whatever name, to sell to laborers in mines and manufactories, is entirely independent of mining and manufacturing, and has no tendency in any possible way to affect the mechanical process of mining and manufacturing. The prohibition of the statute operates not directly upon the business of mining and manufacturing, but upon the individual, because of his participation in that business. It is not imposed for the purpose of rendering mining and manufacturing less perilous or laborious, nor to restrict or regulate the duties of employer and employee in respects peculiar to those industries, but for the sole purpose of imposing disabilities in contracting as to tools, clothing, and food,—matters about which all laborers must contract, and as to which all laborers in every other branch of industry are permitted to contract with their employers, without

Another provision in the same act which prohibits employers from making deductions from the wages of their workmen except for lawful money, checks, drafts, and except as may be agreed, for hospital or relief funds, has also been pronounced invalid, both on the general ground that "the laborer has a right to contract with respect to his labor, and to make such terms and agreements as may be mutu-

any restriction. . . . The privilege or liberty to engage in or control the business of keeping and selling clothing, provisions, groceries, tools, etc., to employees, is one of profit,—of presumptive value; and thus, by the effect of these sections, what the employers in other industries may do for their pecuniary gain, with impunity, and have the law to protect and enforce, the miner and manufacturer, under precisely the same circumstances and conditions, are prohibited from doing for their pecuniary gain. The same act, in substance and in principle, if done by the one, is lawful; but if done by the other, is not only unlawful, but a misdemeanor, punishable by fine. If the general assembly may thus deprive some persons of substantial privileges allowed to other persons under precisely the same conditions, it is manifest that it may, upon like principle, deprive still other persons of other privileges in contracting, which, under precisely the same circumstances, are enjoyed by all but the prohibited class. And it can hardly be admissible that the legislative determination that the facts are such as to warrant this discrimination is conclusive, for that would make the general assembly omnipotent; since, if that were so, there could be nothing but its own discretion to control its action in regard to every liberty enjoyed by the citizen; and it might find that the public welfare required that society should be divided into an indefinite number of classes, each possessing or being denied privileges in contracting and acquiring property, as favoritism or caprice might dictate. . . . It is not doubted that laws may be enacted properly, and without infringing this section of the Constitution, which, by reason of peculiar circumstances, may affect some persons or classes of persons only, who were not before affected by such restriction; but in such instances the circumstances must be so exceptional as to leave no others affected in precisely the same

way upon whom a general law could have effect." This is not confined to sales upon credit, nor to sales of articles paid or to be paid for in work, nor are any exceptions made because of any peculiar circumstances or occasions, however urgently the necessities of individuals may require that there should be exception; but it extends, under any and all circumstances, to every keeping or controlling of any store, shop, or scheme for furnishing supplies, tools, clothing, provisions, or groceries, by the operator of the mine or manufactory, to employees while engaged in mining or manufacturing. While the prohibition includes, by name, only the "person, company, corporation, or association engaged in mining or manufacturing," it includes equally within its effect their employees, for the employee is necessarily denied the right to contract with one who is forbidden by the law to possess, for the purpose of contracting with him, the articles about which he wishes to contract. It would therefore have added nothing to the legal meaning of this section if it had expressly prohibited the employees from contracting with their employer for the purchase of the property in which it is thus made unlawful for their employer to have any ownership. . . . Understanding our Constitution as we do, it is impossible, without disregarding its provisions, to sustain a statute which makes that a misdemeanor when done by persons while engaged in one branch of industry, which, if done by persons in another branch of industry, in like relations and under like conditions, will be lawful. We doubt not that grievous wrongs have resulted from overreaching by employers of employees engaged in mining and manufacturing; but if so, on like principle, precisely the same wrongs are liable to result in other branches of industry under like conditions, and the wrong, wherever done, must, in principle, always be the same."

ally agreeable to him and his employer," and on the special ground that as farmers and farm laborers were exempted from the provisions of the act, it deprived the persons to which it was applicable of the equal protection of the laws.⁶

d. Indiana.—A statute requiring all persons, firms, corporations, etc., engaged in mining or manufacturing, to pay their employees at least once every two weeks, and prohibiting all contracts by such employees to accept anything but lawful money of the United States in payment, has been held valid.⁷

Another enactment, which provided that a merchant taking an assignment of a miner's wages in consideration of any check, ticket,

⁶ *Kellyville Coal Co. v. Harrier* (1904) 207 Ill. 624, 99 Am. St. Rep. 240, 69 N. E. 927 (Act of May 28, 1891, §§ 3, 6).

⁷ *Hancock v. Yaden* (1890) 121 Ind. 366, 6 L.R.A. 576, 16 Am. St. Rep. 396, 23 N. E. 253 (Acts 1887, p. 13). The court said: "It would be not only unnecessary, but improper, to enter upon the work of ascertaining to what extent the Constitution restrains the legislature from regulating or restricting the right to contract; for all that can with propriety be here decided is, that it does not restrain the legislature from enacting laws which operate to maintain or protect the medium of payment established by the sovereign power of the nation. It cannot be denied, without repudiating all authority, that the legislature does possess some power over the right to contract, and if it does, then nothing can be clearer than that this power extends far enough to uphold a statute providing that payment of wages shall be made in money, where there is no agreement to the contrary made after the services have been rendered. Whether the legislature may absolutely declare that nothing shall be payment but money, we need not inquire; for all that is important here is to decide that it may prohibit a contract from being made in advance, waiving the right to payment in what the law says shall be the medium of payment. . . . The power exercised by the legislative department in fixing the standard of value closely resembles that by which the standard of weights and measures is established and maintained. In truth, there is no difference in the inherent nature of the powers; the difference is in the subject-matter to which

they are applied rather than in the powers themselves. The power of the state extends so far as to enable it to declare and enforce penalties against persons who violate the law regulating the standard of weights and measures or the standard of values. It is upon the theory that matters connected with the regulation of the standard of values are within the legislative power that statutes defining and punishing usury are sustained. It is true, we know, that the Federal Congress is the proper authority to regulate the standard of values, but it does not follow from this that a state may not do what it can to prevent the debasement of the standard fixed by Congress. It can, of course, neither lower that standard nor pass laws hostile to those enacted by Congress, but it may support the efforts of the national legislature as far, at least, as it is within the power of a state to do so. . . . The statute operates upon both the employer and the employee. It may, it is true, in its practical operation especially benefit the wage earner, but that is no fault; at all events, the fault is not such a grievous one as to compel the courts to strike it down. It fixes no price upon any man's labor; it leaves the parties to do that, but it does require them to refrain from contracting before the relation of employer and employee begins for payment in anything except the lawful money of the United States. It does not preclude parties from making an accord and satisfaction after wages have been earned and services rendered, although it does command that the antecedent contract shall not provide that payment may be made in something other than lawful money of the nation."

token, or device redeemable in merchandise, should be liable for the full amount of the wages in lawful money, was held to be unconstitutional, as being class legislation.⁸

e. Kansas.—An enactment forbidding “any person, firm, company, corporation, or trust” to pay wages in any other way than in lawful money of the United States, and also making it unlawful to “compel, or in any manner attempt to compel, any employee of any corporation or trust employing ten or more persons to purchase goods or supplies from any particular store or person,” was annulled, both on the general ground that it infringed “natural rights and constitutional grants of liberty,” and also on the special ground of the restricted purview of the second of its clauses.⁹ But in view of a more recent decision of the Federal Supreme Court, upholding the constitution-

⁸ *Diwon v. Poe* (1902) 159 Ind. 492, 60 L.R.A. 308, 95 Am. St. Rep. 309, 65 N. E. 518 (Acts 1901, p. 548). After showing that the enactment, in spite of the generality of some of its terms, must be construed as being applicable only to merchants and to employees in coal mines, the court proceeded thus: “This classification seems to rest upon no sound or proper basis. Laborers and employees engaged in a particular industry, who are no less intelligent and no less competent to care for their own interests than laborers and employees pursuing other occupations, are, by the statute, singled out and authorized to avoid their express agreements, when, under like circumstances, such other laborers and employees enjoy no such privilege. The law does not embrace all of the class to which it is naturally related. It creates a preference, and establishes an inequality among a class of citizens all of whom are equally meritorious. It applies to persons in certain situations, and excludes from its effect other persons who are not dissimilar in these respects. Leaving the miner and the merchant free to deal with all other citizens, the act disqualifies them from contracting with each other. . . . The statute under review does undertake to provide that persons following the lawful trade of merchants shall not have capacity to make certain contracts, or to receive certain transfers of personal property, which are entirely permissible to others. It also, and in a manner quite as offensive to the Constitution, confers privileges and immuni-

ties upon employees and laborers in coal mines which are not possessed by other citizens of this state; employed as laborers in other occupations.” Commenting upon *Hancock v. Yaden*, *infra*, the court observed that “no question as to an improper classification seems to have been made, and the act applied to all persons and corporations in this state engaged in mining, quarrying, or manufacturing, and to everyone in their employment. The point decided in that case was the power of the legislature to restrict the right to contract for a waiver of the benefit of the statute. The question before us, under the act of 1901, is the constitutionality of the classification adopted.” This criticism and the decision itself seem to have virtually overthrown the authority of the earlier case. It is apprehended that the validity of a clause forbidding waiver is a matter which ceases to be of any importance, if the declaratory part of the provision is found to be unconstitutional on the ground of unjust discrimination.

⁹ *State v. Hawn* (1899) 61 Kan. 146, 47 L.R.A. 369, 59 Pac. 340, reversing (1898) 7 Kan. App. 509, 54 Pac. 130 (Laws 1897, chap. 145). Under the former of these heads it was observed that such a statute “treats the laborer as a ward of the government, and discourages the employment of those talents which lead to success in the fields of commercial enterprise. Persons *sui juris* need no guardians. Those who seek to put a protector over labor reflect upon the dignity and independence of the wage earner, and deceive him by

ality of an enactment in which employers are classified with reference to the number of their employees, the latter of these grounds apparently cannot now be regarded as valid.^{9a}

f. Kentucky.—An enactment providing that all wage earners employed in factories, mines, and workshops, or by corporations, shall be paid in lawful money, has been held constitutional. The court relied upon the broad consideration that it was designed to prevent oppression and overreaching.¹⁰

g. Maryland.—An enactment forbidding a certain corporation to pay wages otherwise than in lawful money, and withdrawing from it the right of set-off for goods sold to its employees in contravention of

the promise that legislation can cure all the ills of which he may complain. Such legislation suggests the handiwork of the politician, rather than of the political economist." With respect to the second ground of the annulment, the court said: "Under the penal provisions of the statute in question, a laborer who works for a corporation or trust employing ten or more persons is deprived of his freedom of contract, in that he cannot bargain to receive anything in payment for his labor but lawful money of the United States. While it might be desirable and profitable to the employee of such corporation to receive a horse, or a cow, or a house and lot in payment for his wages, yet the legislature prohibits payment in that way, and places the laborer under guardianship, classifying him in respect to freedom of contract with the idiot, the lunatic, or the felon in the penitentiary. . . . As between persons *sui juris*, what right has the legislature to assume that one class has the need of protection against another? In this country the employee to-day may be the employer next year, and laws treating employees as subjects for such protective legislation belittle their intelligence and reflect upon their standing as free citizens. . . . This discrimination has been justified by writers defending the doctrine of paternalism, and by some judges, upon the asserted fact that labor is constantly engaged in an unequal contest with capital, and that the former must be reinforced by the legislative power of the state to prevent its overthrow in the conflict. Freedom of action—liberty—is the corner stone of our governmental fabric. Laws which

infringe upon the free exercise of the right of a working man to trade his labor for any commodity or species of property which he may see fit, and which he may consider to be the most advantageous, is an encroachment upon his constitutional rights and an obstruction to his pursuit of happiness. Such laws as the one under consideration classify him among the incompetents and degrade his calling. The proportion of lawful money in circulation is small compared with the value of other property in the United States. Accumulated wealth, much or little, is represented in a very small part by money. To say that a free citizen can contract for, or agree to receive in return for his labor, one kind of property only, and that which represents the smallest part of the aggregate wealth of the country, is a clear restriction of the right to bargain and trade,—a suppression of individual effort,—a denial of inalienable rights."

^{9a} See note 1, *supra*.

¹⁰ *Avent Beattyville Coal Co. v. Com* (1894) 96 Ky. 218, 28 L.R.A. 273, 28 S. W. 502. It was denied that this enactment contravenes the Kentucky Bill of Rights. But it would seem that the mere fact of the enactment's having been passed in pursuance of a mandate in the organic law itself must render quite irrelevant all discussion as to its validity in the point of view thus adverted to. The question whether it might not have been objected to as infringing some of the provisions of the Federal Constitution apparently did not suggest itself either to the court or to counsel.

the act, was in one case pronounced valid, as a proper exercise of the power of altering and amending the charter had been reserved by the legislature.¹¹

In a later case a statute which provided that it should be unlawful for any officer or director of a railroad or mining corporation doing business in a specified county to have any interest in any general merchandise store in that county, or sell goods, wares, or merchandise therein, was held to be unconstitutional in that it denied the persons specified the equal protection of the law.¹²

¹¹ *Shaffer v. Union Min. Co.* (1880) 55 Md. 74, 15 Mor. Min. Rep. 59 (Act of 1880, chap. 273, § 1.)

¹² *Luman v. Hitchens Bros. Co.* (1890) 90 Md. 14, 46 L.R.A. 393, 44 Atl. 1051 (Acts of 1898, chap. 493). The court said: "Though it was perfectly competent to the legislature to prevent railroad and mining corporations from engaging in the business of bartering or selling goods, wares, and merchandise, either by not conferring such a power upon them in their charters, or, if it had been conferred, then, by consequently amending the charters and imposing the restriction by such an amendment; yet, it was obviously not within the power of the general assembly to deny to particular individuals who happened to be officers of those corporations, and merely because they were such officers, the right which every other citizen of the county, whether an officer of other corporations or not, possessed to sell goods, wares, and merchandise within the county. Whilst the legislature may, under conditions, create classes and subject all persons coming within the classifications to burdens or duties not imposed upon individuals outside the classes, these classifications must not be arbitrary or unreasonable, but must rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed. It may not single out the directors of one corporation, and solely because they are such directors, prohibit them from engaging in some other business open to the directors of all other corporations; any more than it can by a general enactment, not passed in the exercise of the police power, burden one corporation with a liability from which other corporations of the same kind, under precisely similar circumstances, are re-

lieved. . . . The prohibition which the statute contains is not imposed for the purpose of rendering mining and railroading less perilous or laborious, nor to restrict or regulate the duties of employer and employee in respects peculiar to those industries, but for the sole purpose of imposing disabilities in contracting as to the sale of goods, wares, and merchandise,—things about which all laborers must contract, and as to which officers and agents of all other corporations, and in every other branch of industry, are permitted to contract with their employees without any restriction whatever. . . . The statute does not profess to amend the charter of the appellee company or of any similar company; nor does it provide, even if it could lawfully so provide, that a person owning stock in a trading corporation should, by reason of such ownership, be ineligible to act as a railroad or mining company director; but in plain terms it arbitrarily denies to a person who is a railroad or mining company official, the right possessed by every other individual, whether an officer of other corporations or not, to carry on or to be concerned in the business of buying and selling goods, wares, and merchandise. It denies to designated officers of two kinds of corporations the capacity to make contracts and to use their property as confessedly is permissible to all other persons who are not under some recognized legal disability. Such a denial of the right to engage in the mercantile business, founded exclusively upon the fact that the person denied that right occupies a position of trust in a particular corporation, palpably transcends the due bounds of legislation; and when assailed in a court of justice it must inevitably fall."

h. Massachusetts.—An enactment forbidding an employer to impose a fine upon or to withhold wages from an employee engaged in weaving, for any imperfections in the weaving, has been pronounced invalid as being an improper interference with the freedom of contract which is guaranteed by the state Constitution.¹³

¹³ *Com. v. Perry* (1891) 155 Mass. 117, 14 L.R.A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126 (Mass. Stat. 1891, chap. 125). Knowlton, J., who delivered the opinion of the majority of the court, said: "The act recognizes the fact that imperfections may arise in weaving cloth, and it is evident that a common cause of such imperfections may be the negligence or want of skill of the weaver. When an employer has contracted with his employee for the exercise of skill and care in tending looms, it forbids the withholding of any part of the contract price for nonperformance of the contract, and seeks to compel the payment of the same price for work which in quality falls far short of the requirements of the contract as for that which is properly done. It does not purport to preclude the employer from bringing a suit for damages against the employee for a breach of the contract, but he must pay in the first instance the wages to which the employee would have been entitled if he had done such work as the contract called for. It is obvious that a suit for damages against an employee for failure to do good work would be in most cases of no practical value to the employer, and theoretical remedy of this sort does not justify a requirement that a party to such a contract shall pay the consideration for performance of it when it has not been performed. . . . If the act went no further than to forbid the imposition of a fine by an employer for imperfect work, it might be sustained as within the legislative power conferred by the Constitution of this commonwealth, in chap. 1, § 1, art. 4, which authorizes the general court 'to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same.' It might well be

held that, if the legislature should determine it to be for the best interests of the people that a certain class of employees should not be permitted to subject themselves to an arbitrary imposition of a fine or penalty by their employer, it might pass a law to that effect. But when the attempt is to compel payment under a contract of the price for good work when only inferior work is done, a different question is presented. . . . The manufacture of cloth is an important industry, essential to the welfare of the community. There is no reason why men should not be permitted to engage in it. Indeed, the statute before us recognizes it as a legitimate business, into which anybody may freely enter. The right to employ weavers, and to make proper contracts with them, is therefore protected by our Constitution; and a statute which forbids the making of such contracts, or attempts to nullify them, or impair the obligation of them, violates fundamental principles of right which are expressly recognized in our Constitution. If the statute is held to permit a manufacturer to hire weavers, and to agree to pay them a certain price per yard for weaving cloth with proper skill and care, it renders the contract of no effect when it requires him, under a penalty, to pay the contract price if the employee does his work negligently and fails to perform his contract. For it is an essential element of such a contract that full payment is to be made only when the contract is performed. If it be held to forbid the making of such contracts, and to permit the hiring of weavers only upon terms that prompt payment shall be made of the price for good work, however badly their work may be done, and that the remedy of the employer for their derelictions shall be only by suits against them for damages, it is an interference with the right to make reasonable and proper contracts in conducting a legitimate business which the Constitution guarantees to every one when it declares that he has a 'natural, essential,

i. *Missouri*.—An enactment declaring it to be unlawful for any employer engaged in “manufacturing or mining” to issue in payment of wages any evidence of indebtedness, payable otherwise than in lawful money of the United States, unless the same was redeemable at its face value in cash or in goods or supplies, at the option of the holder, was declared to be void, both as being special legislation, and as being an unwarrantable interference with right of contract.¹⁴

and unalienable’ right of ‘acquiring, possessing, and protecting property.’ Whichever interpretation be given to this part of the act, we are of the opinion that it is unconstitutional.” Holmes, J., delivered a strong dissenting opinion, in the course of which he said: “In the first place, if the statute is unconstitutional, as construed by the majority, I think it should be construed more narrowly and literally, so as to save it. Taking it literally, it is not infringed, and there is no withholding of wages, when the employer only promises to pay a reasonable price for imperfect work, or a price less than the price paid for perfect work, and does pay that price in fact. But I agree that the act should be construed more broadly, and should be taken to prohibit palpable evasions, because I am of the opinion that even so construed, it is constitutional, so far as any argument goes which I have heard. The prohibition, if any, must be found in the words of the Constitution, either expressed or implied upon a fair and historical construction. What words of the United States or state Constitution are relied on? The statute cannot be said to impair the obligation of contracts made after it went into effect. *Lehigh Water Co. v. Easton* (1887) 121 U. S. 388, 391, 30 L. ed. 1059, 1060, 7 Sup. Ct. Rep. 916. So far as it has been pointed out to me, I do not see that it interferes with the right of acquiring, possessing, and protecting property any more than the laws against usury or gaming. In truth, I do not think that that clause of the Bill of Rights has any application. It might be urged, perhaps, that the power to make reasonable laws impliedly prohibits the making of unreasonable ones, and that this law is unreasonable. If I assume that this construction of the Constitution is correct, and that, speaking as a political economist, I should agree in condemning the law, still I should not be willing or

think myself authorized to overturn legislation on that ground, unless I thought that an honest difference of opinion was impossible, or pretty nearly so. But if this statute did no more than to abolish in certain cases contracts for a *quantum meruit*, and recompense for defective quality not amounting to a failure of consideration, I suppose that it only would put an end to what are, relatively speaking, innovations in the common law, and I know nothing to hinder it. This, however, is not all. I do not confine myself to technical considerations. I suppose that this act was passed because the operatives, or some of them, thought that they were often cheated out of part of their wages under a false pretense that the work done was imperfect, and persuaded the legislature that their view was true. If their view was true, I cannot doubt that the legislature had the right to deprive the employers of an honest tool which they were using for a dishonest purpose, and I cannot pronounce the legislation void, as based on a false assumption, since I know about the matter, one way or the other. The statute, however construed, leaves the employers their remedy for imperfect work by action. I doubt if we are at liberty to consider the objection that this remedy is practically worthless; but if we are, then the same objection is equally true, although for different reasons, if the workmen are left to their remedy against their employers for wages wrongfully withheld. My view seems to me to be favored by *Hancock v. Yaden* (1890) 121 Ind. 366, 6 L.R.A. 576, 16 Am. St. Rep. 396, 23 N. E. 253, and *Slaughter House Cases* (1872) 16 Wall. 36, 80, 81, 21 L. ed. 394, 409, 410.”

The above decision was followed in *Com. v. Potomaska Mills Corp.* (1891) 155 Mass. 122, note, 28 N. E. 1128.

¹⁴ *State v. Loomis* (1892) 115 Mo. 307, 21 L.R.A. 802, 22 S. W. 350, revers-

On the latter of these grounds the amended enactment which, by its terms, is applicable to "any person, firm, or corporation," has also

ing (1892) — Mo. —, 21 L.R.A. 789, 20 S. W. 332 (Rev. Stat. 1889, § 7058). Black, J., in delivering the opinion of the majority of the court, said: ["These provisions] . . . single out those persons who are engaged in carrying on the pursuits of mining and manufacturing, and say to such persons, you cannot contract for labor payable alone in goods, wares, and merchandise. The farmer, the merchant, the builder, and numerous contractors employing thousands of men, may make such contracts, but you cannot. They say to the mining and manufacturing employees, though of full age and competent to contract, still you shall not have the power to sell your labor for meat and clothing alone, as others may. It will not do to say these sections simply regulate payment of wages, for that is not their purpose. They undertake to deny to the persons engaged in the two designated pursuits the right to make and enforce the most ordinary everyday contracts,—a right accorded to all other persons. This denial of the right to contract is based upon a classification which is purely arbitrary, because the ground of the classification has no relation whatever to the natural capacity of persons to contract. Now it may be that instances of oppressions have occurred and will occur on the part of some mine owners and manufacturers, but do they not occur quite as frequently in other fields of labor? Conceding that such instances may and do occur, still that furnishes no reasonable basis for depriving all persons engaged in the two lawful and necessary pursuits of the right to make and enforce everyday contracts. Liberty, as we have seen, includes the right to contract as others may; and to take that right away from a class of persons following lawful pursuits is simply depriving such persons of a time-honored right which the Constitution undertakes to secure to every citizen. Applying the principles of constitutional law before stated, we can come to no other conclusion than this: that these sections of the statute are utterly void. They attempt to strike down one of the fundamental principles of constitutional government. If they can stand, it is difficult to see

an end to such legislation, and the government becomes one of special privileges, instead of a compact 'to promote the general welfare of the people.' We place our conclusion on the broad ground that these sections of the statute are not 'due process of law' within the meaning of the Constitution. . . . The constitutional declaration that no person shall be deprived of life, liberty, or property without due process of law was designed to protect and preserve their existing rights against arbitrary legislation as well as against arbitrary executive and judicial acts. The sections of our statute in question deprive a class of persons of the right to make and enforce ordinary contracts, and they introduce a system of state paternalism which is at war with the fundamental principles of our government, and, as we have before said, are not due process of law." Barclay, J., delivered an elaborate and well argued dissenting opinion, in the course of which he said: "The lawmaker necessarily deals with conditions as he finds them. If he observes and wishes to abate some fraudulent practice or abuse of power prevailing only in one line of business, the fact that, in legislating to correct it, he does not also include in his remedy all other phases in human affairs, can furnish no reason for stigmatizing his remedy as no law at all. If an act reaching only mining and manufacturing concerns is, on that account, not 'due process of law,' what must be held of statutes establishing special rules of liability, or business regulations, applicable to railroads only, to warehousemen, pawnbrokers, auctioneers, millers, and the many other classes of persons whose affairs form topics of treatment in separate laws in Missouri? Are all such statutes void because each relates to persons engaged only in the particular classes of business named in it? Probably they would not be so held. Some of them are acted on and enforced almost daily. Yet if they are valid, what, let me ask, is there so exceptional about the truck system that precludes legislation applicable to those lines of business in which it prevails? . . . If a law applicable only to persons engaged in mining is constitutional when dealing

been pronounced invalid.¹⁵ But the position thus taken seems to involve an unwarrantable disregard of the decision of the Federal Supreme Court which is reviewed in subsec. m, *infra*.

with the topics of their health and safety, it is obvious that an act designed to prevent fraud or oppression in the payment of wages in mining and manufacturing enterprises is not objectionable on the ground of the selection or 'classification' of those enterprises as subjects for separate legislation. . . . It seems unreasonable to hold that the courts alone may determine what the public policy of a state shall be respecting the validity of agreements between parties situated so that one may have undue advantage over the other. Why has not the legislature power, by general law operating on future dealings, to declare a similar public policy?" He considered that the effect of the enactment in question was "to establish a just standard of value for every dollar due for wages. It does not differ in principle from governmental regulations in the form of laws by which a person who has contracted to receive a yard of cloth or a bushel of corn is protected against the necessity of accepting such a short yard or light bushel as the seller may choose to impose upon him. Statutes designed to prevent that sort of overreaching have been universally regarded as proper exertions of the police power. . . . In view of the onerous bearing of the truck system upon some of those whom it affects, in compelling them to accept payment for labor in articles whose value is determined by the party adversely interested in the bargain, this statute (which seeks to relieve against that hardship) should be held (no less than those already mentioned) 'due process of law.' . . . It has been suggested, in the main opinion as well as at the bar, that the statute in question is subject to criticism as being an exhibition of paternalism in government. To this it may properly be answered that that consideration affects only the policy of the statute, and not the constitutional power of the legislature to enact it. Students of juridical history are aware that governmental interferences with liberty of contract between man and man are less frequent now than in earlier epochs of the English law. Spencer, 'Justice,' chap. 15, § 70; Mayme, An-

cient Law, 3 Am. ed. chap. 9, p. 295. But the power to interfere when necessary to prevent oppression is an important prerogative of sovereignty, and resides in the people of this state, subject only to the limitations expressed in their Constitution. The cure for paternal legislation is not to be found in an assumption by the courts of any part of the power of self-government belonging to the people or their representatives."

¹⁵ *State v. Missouri Tie & Timber Co.* (1904) 181 Mo. 536, 65 L.R.A. 588, 103 Am. St. Rep. 614, 80 S. W. 933, 2 Ann. Cas. 119 (Rev. Stat. 1899, §§ 8142-8144). The contention of the state was that "in the circumstances covered by the act in question, the employer and employee are not upon an equal footing, but that the laborer, owing, as a rule, to his necessities, is at a disadvantage, and that as the right to contract is not absolute, the state, in the exercise of its police powers, had the authority to pass the act in question as a police regulation." The court admitted that this contention was supported by *Hancock v. Yaden* (1890) 121 Ind. 366, 6 L.R.A. 576, 16 Am. St. Rep. 396, 23 N. E. 253 (see note 7, *supra*), but said that the authority of that case had already been repudiated by the court in *State v. Loomis* (1893), 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350. It was also conceded that a view similar to that of the Indiana court was reflected in *Harbison v. Knoxville Iron Co.* (1899) 103 Tenn. 421, 56 L.R.A. 316, 76 Am. St. Rep. 682, 53 S. W. 955, and the affirming decision in (1901) 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1. (See note 19, *infra*.) But the court was of opinion that "under the great weight of authority the act in question cannot be upheld, in so far as defendant company and its adult employees are concerned, upon the ground of its being a police regulation, for it cannot be said that the defendant, in operating its tie and timber business, is anyway pursuing a public business, or has devoted its property to a public use, and the statute must be held unconstitutional upon the ground that it interferes with or abridges the right of persons competent to contract with each

j. New Jersey.—In one case it was questioned whether an act forbidding certain designated persons to pay the wages of workmen or employees in “store goods, merchandise, printed or verbal orders, or duebills of any kind,” was valid; but the point was not determined.¹⁶

k. Pennsylvania.—An enactment which required all persons, firms, companies, corporations, or associations, engaged in mining or manufacturing any mineral, to pay their employees at least once a month in lawful money of the United States, or by orders redeemable in such within thirty days, was pronounced invalid as being an interference with the right of contract.¹⁷

l. South Carolina.—A provision declaring it to be unlawful for “any corporation, person, or firm,” to issue for payment of wages any evidence of indebtedness payable otherwise than in lawful money of the United States, unless the same is negotiable in cash or goods, at the option of the holder, has been held to be valid, although agricultural contracts or advances made for agricultural purposes are excepted from its purview.¹⁸

other with respect to the manner in which defendant's employees were to be paid for their services. The right to labor or employ labor, and make contracts with respect thereto, upon such terms as may be agreed upon, is both a liberty and property right, and is included in the guaranty of the Constitution which provides ‘that no person shall be deprived of life, liberty, or property without due process of law.’ Const. § 30, art. 2. Nor can such right to contract be arbitrarily interfered with, but may be subject to limitations growing out of duties which the individual owes to society; but such limitation must be upon some reasonable basis, and not arbitrarily. *Ritchie v. People* (1895) 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454.” The doctrine enounced in this case was also applied in *Leach v. Missouri Tie & Timber Co.* (1905) 111 Mo. App. 650, 86 S. W. 579.

¹⁶ In *Cumberland Glass Mfg. Co. v. State* (1895) 58 N. J. L. 224, 33 Atl. 210 (act of 1880, § 1, Supp. Rev. p. 771).

¹⁷ *Godcharles v. Wigeman* (1886) 113 Pa. 431, 6 Atl. 354 (act of June 29, 1881). This decision was put upon the broad ground that the legislature had attempted, “to do what, in this country, cannot be done; that is, prevent persons who are *sui juris* from making their

own contracts. The act is an infringement alike of the right of the employer and the employee; more than this, it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal; and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void.” The decision seems to be essentially inconsistent with the ruling of the Federal Supreme Court which is reviewed in subsec. *m, post*.

¹⁸ *Johnson v. Spartan Mills* (1904) 68 S. C. 339, 47 S. E. 695, 1 Ann. Cas. 409 (Code 1902, §§ 2719, 2720). Discussing the question whether their exception of agricultural contracts constitutes an arbitrary classification, the court said: “The two systems of labor engaged in farming, on the one hand, and manufacturing, on the other, and the conditions surrounding each, are distinct in many ways. The large number of mill operatives, aggregated into communities, as contrasted with the few laborers in the employ of the average farmer, and scattered throughout the country; the daily output of the mills, as contrasted with the yearly

m. Tennessee.—By the Supreme Court of the United States, an enactment requiring employers who issue written evidences of indebtedness for the payment of wages to redeem them in lawful money, at their face value, has been pronounced to be a legitimate restriction of the right of contract.¹⁹

product of the farm; the resources of aggregated wealth to command ready cash, compared with the ability to pay always in cash of the average farmer, dependent for his cash upon crops once a year; the consequent ease with which manufacturers may carry out a system involving regular pay days in cash at brief intervals throughout the year, as contrasted with the difficulties in the way of the farmer to comply with such a system; the rarity of contracts to pay mill laborers in anything but money; the prevalence of farm labor contracts involving payment of wages in supplies or farm products,—are some of the considerations which would make it reasonable to have some differences in the regulations made for the protection of the respective classes of labor. It is well known that many agriculturists contract to pay a portion of the wages of labor in supplies obtained through orders upon merchants. A very prevalent system of farming exists in this state, under which the farm laborer agrees to receive a share of the crops grown or cultivated by him as compensation for his labor; but in the meantime, until the crops are gathered and divided, the landowner undertakes to make advances in supplies, to be deducted from the laborer's share of the crop. The necessities of the average farmer often compel him to make arrangements with some merchant to fill his orders for supplies to such laborers. Now, but for the proviso in § 2719, all orders for supplies which could be construed to be in payment for labor issued by landowners to farm laborers under these circumstances would be redeemable in cash in the hands and at the option of the laborer, if presented for redemption, as required by the statute, notwithstanding the laborer's contract to the contrary, although such contract is a part of a prevalent system advantageous to both landowner and laborers. To place orders of landowners, made under such circumstances, in the category of merchandise checks, etc., redeemable in cash, as prescribed in the

statute, would very seriously affect the system of labor contracts on farms."

¹⁹ *Knowville Iron Co. v. Harbison* (1901) 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1, affirming (1899) 103 Tenn. 421, 56 L.R.A. 316, 76 Am. St. Rep. 682, 53 S. W. 955 (Tenn. act of March 17, 1899). The following remarks were made by the state court: "The limitation placed upon the right of contract by this act is not arbitrary and oppressive, but entirely just and reasonable. While in some sense qualifying certain contracts of the employer, it in no sense works a great hardship upon him. It only requires that, in certain events, he shall pay the wages of his employee in money, rather than in something less desirable. The legislature, as it thought, found the employee at a disadvantage in this respect, and by this enactment undertook to place him and the employer more nearly upon an equality. This alone commends the act and entitles it to a place on the statute book as a valid police regulation. Besides the amelioration of the employee's condition in the way mentioned, the act was intended and is well calculated to promote the public peace and good order, and to lessen the growing tendency to strife, violence, and even bloodshed in certain departments of important trade and business." The above statement was approved by the Federal Supreme Court, which also observed: "Confessedly, the enactment now called in question is in all respects a valid statute, and free from objection as such, except that it is challenged as an arbitrary interference with the right of contract, on account of which it is said that it is unconstitutional and not the 'law of the land' or 'due process of law.' The act does, undoubtedly, abridge or qualify the right of contract, in that it requires that certain obligations payable in the first instance in merchandise shall in certain contingencies be paid in money; yet it is as certainly general in its terms, embracing equally every employer and employee who is or may be in like

n. Texas.—An enactment by which it was declared to be unlawful for any person, firm, association of persons, corporation, or agent of either, to issue any ticket, check, or writing obligatory to any servant or employee for labor performed, redeemable or payable in goods or merchandise, was annulled on the ground that it interfered with the right of contract.²⁰

situation and circumstances, and it is enforceable in the usual modes established in the administration of government with respect to kindred matters. . . . The legislature evidently deemed the laborer at some disadvantage under existing laws and customs, and by this act undertook to ameliorate his condition in some measure by enabling him or his bona fide transferee, at his election and at a proper time, to demand and receive his unpaid wages in money rather than in something less valuable. Its tendency, though slight it may be, is to place the employer and employee upon equal ground in the matter of wages, and, so far as calculated to accomplish that end, it deserves commendation. Being general in its operation, and enforceable by ordinary suit, and being unimpeached and unimpeachable upon other constitutional grounds, the act is entitled to full recognition as the 'law of the land,' and 'due process of law,' as to the matters embraced, without reference to the state's police power, as was held of an act imposing far greater restrictions upon the right of contract. . . . The passage of this act was a legitimate exercise of police power, and upon that ground also the legislation is well sustained. The first right of a state, as of a man, is self-protection; and with the state that right involves the universally acknowledge power and duty to enact and enforce all such laws not in plain conflict with some provision of the state or Federal Constitution as may rightly be deemed necessary or expedient for the safety, health, morals, comfort, and welfare of its people." Referring to *St. Louis, I. M. & S. R. Co. v. Paul* (1899) 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419 (see § 2826, note 1, *post*), in which stress had been laid in the opinion on the fact that, in the Constitution of the state, in which the case originated, the power to amend corporation charters was reserved to the state, the court re-

marked: "It is also true that, inasmuch as the right to contract is not absolute in respect to every matter, but may be subjected to the restraints demanded by the safety and welfare of the state and its inhabitants, the police power of the state may, within defined limitations, extend over corporations outside of and regardless of the power to amend charters."

In *Dayton Coal & I. Co. v. Barton* (1901) 183 U. S. 23, 46 L. ed. 61, 22 Sup. Ct. Rep. 5, affirming (1899) 103 Tenn. 604, 53 S. W. 970, it was held that this statute was valid in respect of foreign as well as of domestic corporations, since the right of the former to do business in the state was to be deemed subject to the condition of obeying the regulations prescribed by state laws.

²⁰ *Jordan v. State* (1907) 51 Tex. Crim. Rep. 531, 11 L.R.A.(N.S.) 603, 103 S. W. 633, 14 Ann. Cas. 616. The court said: "Several reasons are urged why the pleading does not show any offense, and that the law under which the pleading is drawn is unconstitutional, in that it violates article 1, § 19 of the state Constitution, besides two clauses of the Federal Constitution, and that it interferes with the right of free contract between the citizens of this state in relation to their private matters. We are of opinion that these contentions are correct. . . . As we understand the question, labor is property, and the laborer has the same right to sell his labor and make contracts with reference thereto as he would any other property he had. The legislature has no authority to prevent the citizenship of this country from making their own contracts, nor to interfere with the freedom of contract between workman and employer." "Under this law no citizen of the state, having another in his employment, could give an order or a check or any character of writing to another to pay off the holder of the check or writing in any character of

o. Washington.—An amendment to an act which prohibited corporations, etc., from paying employees by orders, etc., or otherwise than in lawful money, unless such orders, etc., are negotiable in money, provides that wages earned by laborers shall be payable whenever they cease work. This supplementary clause has been sustained against the objection that it deprives citizens of property without due process of law.²¹

p. West Virginia.—An enactment which forbade any person, firm, corporation, or association, engaged in mining or manufacturing, to issue for the payment of labor any order or other paper, unless it purported to be redeemable for its face value, in lawful money of the United States, was held to be unconstitutional as being an improper interference with the right of contract.²²

goods or merchandise. Under this law, the farmer could not pay off his employee or hired hand at the end of the day, week, or month by giving him an order, or a check, or any paper in writing calling for payment in goods or merchandise. In other words, this law would prevent the employer and employee from entering into any contract by which the labor performed, or to be performed, by the employee, could be discharged or paid off in merchandise at the hands of another. That this is violative of every fundamental principle of the right of contract will hardly need more than the mere statement of the proposition. Police power or police regulation cannot be upheld to the extent that it will prevent the citizenship of this country making such contracts as they see proper, so long, at least, as the law ignores coercion, or some of those matters that might enter into and prevent a free and untrammelled contract. If the contracting parties prefer to pay off and receive in pay for labor any goods or merchandise, or any commodity that is suitable to the contracting parties, it would be beyond the police power to prevent such contract. We are dealing only with the law as enacted; nor are we alluding to, or undertaking to discuss, any law that was not intended for the benefit of the weaker and against the strong, or any legislation to prevent coercion on the part of either of the contracting parties. Those questions are not involved in this law, for, by its very terms, it was enacted to prevent any contract from being entered into between the parties where

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the pay was to be in goods or merchandise. This law is not a sanitary measure, nor is it enacted to protect infants and insane people." The court reviewed several cases which supported its own position and explicitly repudiated the authority of *State v. Peel Splint Coal Co.* (1892) 36 W. Va. 802, 17 L.R.A. 385, 15 S. E. 1000 (see subsec. *g, infra*). But, strangely enough, the decision of the Federal Supreme Court, reviewed in subsec. *m, a supra*, was not referred to.

²¹ *Shortall v. Puget Sound Bridge & Dredging Co.* (1907) 45 Wash. 290, 122 Am. St. Rep. 899, 88 Pac. 212. The court said: "We think the practice, pursued by certain employers of labor, of paying the wages of their employees in orders drawn upon stores, redeemable in commodities other than lawful money of the United States, and of postponing the day of payment until long after the wages were earned, was a real evil, operating to the detriment of the wage earner, and consequently to the detriment of the state. As such, the practices were subject to correction by the legislature, and its act in that regard was well within the rules of sound public policy."

²² *State v. Goodwill* (1889) 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285 (Acts 1887, chap. 63, §§ 1, 3). The scope of the decision as stated in the headnote written by the court is as follows: "It is not competent for the legislature under the Constitution, to single out owners and operators of mines and manufacturers of every kind, and provide that they shall bear bur-

The same position was taken with regard to an enactment which declared it to be unlawful for the employers to sell their merchandise to their employees at a higher per cent of profit than they sell to persons not employed by them.²³

dens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make. Such legislation cannot be sustained as an exercise of the police power." Referring to § 1 of the 14th Amendment of the Federal Constitution, and Art. 3, § 1, of the West Virginia Constitution, to the effect that citizens have an inherent right to "the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety," the court propounded the question: "Can the legislature, in view of these constitutional guaranties, limit or forbid the right of contract between parties under no mental, corporal, or other disability, when the subject of contract is lawful, not public in its character, and the exercise of it is purely private and personal to the parties themselves?" The grounds upon which it was considered that a negative answer was indicated were stated thus: "The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens, and not of others, when there is no public necessity for such discrimination, is unconstitutional and void." "The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. . . . It is equally an encroachment both upon the just liberty and rights of the workman and his employer, or those who might be disposed to employ him, for the legislature to interfere with the freedom of contract between them, as such interference hinders the one from working at what he thinks proper, and at the same time prevents the other from employing whom he chooses. A person living under the protection of this government has the right to adopt and

follow any lawful industrial pursuit, not injurious to the community, which he may see fit. And, as incident to this, is the right to labor or employ labor, make contracts in respect thereto upon such terms as may be agreed upon by the parties, to enforce all lawful contracts, to sue and give evidence, and to inherit, purchase, lease, sell, and convey property of every other kind. The enjoyment or deprivation of these rights and privileges constitutes the essential distinction between freedom and slavery; between liberty and oppression. . . . The vocation of an employer, as well as that of his employee, is his property. Depriving the owner of property of one of its attributes is depriving him of his property, under the provisions of the constitution. *People ex rel. Manhattan Sav. Inst. v. Otis* (1882) 90 N. Y. 48. The right to use, buy, and sell property, and contract in respect thereto, including contracts for labor,—which is, as we have seen, property,—is protected by the constitution. If the legislature, without any public necessity, has the power to prohibit or restrict the right of contract between private persons in respect to one lawful trade or business, then it may prevent the prosecution of all trades, and regulate all contracts." The contention that the act was a valid exercise of the police power was disposed of with the remark that this power, however broad and extensive, is not above the Constitution, and must be exercised in subordination to it.

²³ *State v. Fire Creek Coal & Coke Co.* (1889) 33 W. Va. 188, 6 L.R.A. 359, 25 Am. St. Rep. 891, 10 S. E. 288 (Acts 1887, chap. 63, § 4). The court said: "There are many considerations for selling goods or supplies at a less per cent of profit to one customer than to others. The goods may be of the 'like character, kind, quality, and quantity,' and still there may be considerations, entirely proper, why the sale should not be at the same price in all cases,—such as the character and promptness of the customer; the risk of loss or time of payment; the aggregate

In 1891 the legislature passed another act, which was of a similar tenor in regard to the restrictions imposed, but which was so expressed as to be applicable to all classes of employers. In the case cited below, the judges were equally divided upon the question whether this statute was valid. Those who were in favor of sustaining it based their opinion upon the consideration that it was a legitimate exercise of the police power, as being designed to prevent fraud and oppression.²⁴

amount of purchases by the same person of different kinds of goods or supplies. It may be more profitable to sell a large bill of different kinds of goods to a large consumer than to sell one of the same kind of articles to one who buys nothing else. The statute is a Procrustean bed. It consigns all sizes and conditions to the same measure of treatment, regardless of their differences. It excludes all freedom in trade, and all considerations of mutual benefit, and even charity. If the employer sells goods to the family of some friend, in indigent circumstances, at less than cost, then, under this statute, he must sell at the same price to all his employees. But it is unnecessary to illustrate the vices, the crudities, and the injustice of the statute. That it is an attempt to do for private citizens, under no physical or mental disabilities, what they can best do for themselves, is apparent. It selects miners and manufacturers as a class, and denies to them privileges which are not only proper and legitimate in themselves, but also to some extent necessary and unavoidable in the conduct of the business,—privileges which concern private affairs solely, and which are enjoyed by all other classes of citizens. . . . In condemning this statute, we do not wish to give countenance to the idea that any employer, whether he is engaged in mining, manufacturing, or any other business, has the right to discriminate against his employees, by selling to them goods or supplies, under similar circumstances, at a greater per cent of profit than he does to his other customers. Such a discrimination is not only unjust, but it is subversive of the first principles of trade; and no employee should buy from such employer. The remedy is in the hands of the employee. He is not compelled to buy from his employer; and the general law, without any special statute, will fully protect him in his refusal to do so.

The ground on which this act is condemned is that it is class legislation, and an unjust interference with the rights, privileges, and property of both the employer and the employee, and places upon both the badge of slavery, by denying to the one the right of managing his own private business, and assuming that the other has so little capacity and manhood as to be unable to protect himself or manage his own private affairs."

²⁴*State v. Peel Splint Coal Co.* (1892) 36 W. Va. 802, 17 L.R.A. 385, 15 S. E. 1000. In this case the provisions in Laws 1891, chap. 76, § 1, regarding the payment of wages, and in Laws 1891, chap. 82, § 1, regarding the weighing of coal in mines where workmen were paid by weight, were considered at the same time. The following passages may be quoted from the opinion of Lucas, P., one of the judges who was in favor sustaining the act: "It is claimed that the acts in question are infringements of the 1st section of the Bill of Rights because they impair the enjoyment of liberty, and interfere with and limit the means of acquiring and possessing property. . . . We are not able to say that the legislature has transcended its inherent power to make reasonable police regulations, or that it has violated the article of the Constitution of this state, above quoted. We base this decision in this case: First, upon the ground that the defendant is a corporation in the enjoyment of unusual and extraordinary privileges, which enables it and similar associations to surround themselves with a vast retinue of laborers, who need to be protected against all fraudulent or suspicious devices in the weighing of coal or in payment of labor; secondly, the defendant is a licensee, pursuing a vocation which the state has taken under its general supervision for the purpose of securing the safety of employees, by ventilation, inspection, and govern-

mental report, and the defendant, therefore, must submit to such regulations as the sovereign thinks conducive to public health, public morals, or public security. We do not base this decision so much upon the ground that the business is affected by the public use, but upon the still higher ground, that the public tranquillity and the good and safety of society demand, where the number of employees is such that specific contracts with each laborer would be improbable, if not impossible, that, in general contracts, justice shall prevail as between operator and miner; and, in the company's dealing with the multitude of laborers, with whom the state has by special legislation enabled the owners and operators to surround themselves, that all opportunities for fraud shall be removed. The state is frequently called upon to suppress strikes, to discountenance labor conspiracies, to denounce boycotting as injurious to trade and commerce; and it cannot be possible that the same police power may not be invoked to protect the laborer from being made the victim of the compulsory power of that artificial combination of capital which special state legislation has originated and rendered possible. It is a fact worthy of consideration, and one of such historical notoriety that the court may recognize it judicially, that every disturbance of the peace of any magnitude in this state since the Civil War has been evolved from the disturbed relations between powerful corporations and their servants or employees. It cannot be possible that the state has, no police power adequate to the protection of society against the recurrence of such disturbances, which threaten to shake civil order to its very foundations. Collisions between the capitalist and the workmen endanger the safety of the state, stay the wheels of commerce, discourage manufacturing enterprise, destroy public confidence, and at times throw an idle population upon the bosom of the community. Surely the hands of the legislature cannot be so restricted as to prohibit the passage of laws directly intended to prevent and forestall such collisions. . . . It seems clear to my mind that both of the acts which we are now considering were passed with a view of cutting off opportunities for fraud, and therefore they were fairly within the police power of the legislature." The opinion was

also expressed that "the 14th Amendment [of the Federal Constitution] was never intended to strike down the police power of the state, nor to control its exercise, except in cases where it (the act) amounts plainly to usurpation, and the wresting of private property from its legitimate owners without compensation."

The case of *Godcharles v. Wigeman* (1886) 113 Pa. 431, 6 Atl. 354 (see note 17, *supra*), was disapproved. On rehearing, the effect of what was said above was summarized as follows: "The principle seems to be that when a few persons are engaged in an extensive business, and they have a multitude of customers or dependent employees, and it appears that the business is of such a character that the parties do not deal upon an equal footing, and that the many are at a disadvantage in their contractual relations with the few, the legislature may regulate these relations, with a view to prevent fraud, oppression, or undue advantage. Familiar illustrations are contracts for the loan of money; for transportation of persons and freight; for insurance of life and property; for the manufacture and sale of lard and artificial butter; for measuring and inspecting lumber, grain, tobacco, flour, etc. The number of these peculiar subjects must vary as trade and commerce increase or drift into new channels." After referring to the fact that the protection of life and health had always been regarded as a legitimate subject for legislative interference with contractual relations between miners and operators or owners, the learned judge asked: "Upon what conceivable ground can it be maintained that the second object, namely to protect against fraudulent practices, is not equally in the scope of the police power of the legislature? This view of the case is so perfectly conclusive to my mind that no amount of argument or authority can add to its strength. And once concede that the coal industry is a proper subject for the exercise of police regulation, and it follows, by all the authorities, that the legislature, not the courts, is to judge of the propriety and reasonableness of any given regulation, provided that it be enacted for the avowed police purposes, and is not upon its face in excess of the police power claimed. In other words, if any conceivable circumstances would justify the exercise of such police power, the legis-

2821. Enactments regulating the computation of wages.— The essence of all the enactments of this type with which we are concerned in the present section is, that persons or corporations who pay by weight for coal mined by their employees shall weigh it before it is screened. See chapter xxvii., *ante*. The decisions of the state courts are hopelessly inconsistent; but the authority of those which have affirmed the invalidity of such enactments seems to have been entirely overthrown by the ruling of the Federal Supreme Court which is reviewed in subsec. —; in so far, at all events, as they proceeded either upon the ground that they involved an improper interference with the right of contract, or upon the ground that they denied the equal protection of the laws.

a. Arkansas.—The act of 1899, which provided that any corpo-

lature, not the courts, is to judge of the existence or prevalence of such circumstances." Referring to English truck acts, he proceeded thus: "Upon their very face they proclaim their object 'to prevent abuses and frauds,' and they were therefore police regulations, in the strictest sense of the term. Down through the centuries, hand in hand, and consolidated into one police regulation, have come these conspiracy laws to protect capital, and these truck acts to protect labor, and both to protect society; and are we now to be told that the effect of adopting our free American Constitutions is to leave in full vigor the power to protect capital, but to destroy the concomitant and correlative power to protect labor? The two powers, associated in their exercise for centuries, have not been divorced by American institutions. Such an idea is not to be entertained for a moment. The American lawmakers are presumed to have known of the existence of these police powers at common law, and in the statute law of England, embedded for centuries, and it is not to be presumed, when they framed the restrictions of our Constitutions, that they meant to prohibit the exercise of such police powers, when demanded in behalf of the security of society, and necessary to prevent fraud and abuse." The views of English, J., one of the dissenting judges, were thus stated: "While this act seems to be aimed only at corporations and persons engaged in trade or business, it would include in its operation a person engaged in farming, which constitutes one of the great industries

of the country, on which many others depend, and would forbid the farmer from giving his farm hand an order to the village store for merchandise in payment for his labor; and it loses sight of the fact that a large portion of every community is composed of those who have retired from business, or who never engaged in any trade or business. To one of the latter class, who are not engaged in any of the active industries of the country, the act does not apply. He may employ a man to black his boots or groom his horse or spade his garden, but surely he could not be regarded as being engaged in the business of blacking boots, grooming horses, or spading gardens, and, if he has not the money in his pocket, he may with impunity give his servant an order to the store in payment for his service because he is engaged in no trade or business. . . . This statute would prevent the mine operator from giving to the miner who came to him empty handed, and wanted to labor, an order to his store for meat and flour to live on until he earned something; although accepting said contract would amount to no antecedent agreement to receive all of his wages in goods, yet it might be considered an advance for labor not due, and would thus fall within the inhibition of this statute, and results in this: that a mine operator cannot lawfully advance wages in the shape of merchandise to the miner before he has earned them, nor can he pay him anything but money after the services have been performed, however willing the miner might be to accept it."

ration or person employing twenty or more persons in mining coal should keep scales to weigh the coal mined, and that all coal mined and paid for by weight should be weighed before it was screened, was held to be valid in respect of corporations, the decision being based upon the grounds that the state Constitution provides that powers granted to corporations may be altered or revoked, and that the act was not objectionable, either as being class legislation, or as restricting the right of contract, and as taking property without due process of law.¹

¹ *Woodson v. State* (1900) 69 Ark. 521, 65 S. W. 465. The court said: "The language is, 'all coal mined and paid for by weight shall be weighed before it is screened, etc.' This includes the small as well as the large operator, though by the 1st section the operator employing less than twenty men is not required to procure and keep on hand the weights and measures mentioned. He can, if convenient, use the scales or measures belonging to others; but if there are none such convenient, he must necessarily keep them, or he cannot pay for his coal by weight. The obvious reason for the distinction in the 1st section is that it might be very burdensome to require the small operator to keep on hand an expensive set of scales and measures, when his situation might make this unnecessary; whereas the large operator would usually need such scales and measures, and the requirement as to him would usually be less burdensome than it would be upon the small operator. This, it would seem, furnishes a justification for the distinction made by the legislature in the 1st section, while as to the 2d section, the one involved here, there is no distinction made." The court also remarked (p. 526 of opinion) that, even if it were conceded that the right to contract is a part of the natural liberty which the legislature cannot take away, "it does not follow that a corporation is equally exempt from legislative control in that respect. The citizen does not derive his right to contract from the legislature. The corporation does, and it possesses only such powers as may be conferred upon it by the legislative will; and these, under our Constitution, are liable to be altered, revoked, or annulled by the power that granted them. Art. 12, § 61, Const. of Ark. The plain pur-

pose of this constitutional reservation was to keep corporations under legislative control. The only limitation on this power of the legislature, contained in our Constitution, is that the alteration, revocation, or annulment of the corporate powers must be made 'in such manner that no injustice shall be done to the corporators.' . . . Whether injustice has been done the incorporators depends upon the facts of each case in which an alteration or revocation of corporate powers has been attempted. But we do not see that the statute under consideration here is open to any such objection. It was made to take effect ninety days after its passage, and was prospective in its operation. It did not interfere with vested rights or existing contracts, or deprive such corporations of any property possessed by them. The purpose of the act, as shown in the title and in the act itself, was to protect a class of laborers against certain frauds which the legislature supposed might be perpetrated upon them in the process of screening when coal was not weighed until after it has been screened. The act does not require the coal to be weighed when the laborer or miner is paid by the hour or day, or when he is paid by measure, and not by weight. Even when the laborer is paid by the weight of the coal mined, it does not attempt to regulate the price to be paid, but expressly leaves that to be settled by the agreement of the parties. . . . The right to contract upon the part of the citizen is not unlimited. One has no right to complain that the law will not permit him to make valid contracts with an infant or insane person, or that it will not allow him to make usurious or other forbidden contracts. It is equally

The act of 1905 by which it is declared to be unlawful for "any mine owner, lessee, or operator of coal mines, where ten or more men are employed underground, employing miners at bushel or ton rates, or other quantity, to pass the output of coal mined by said miners over any screen or any other device which shall take any part from the value thereof before the same shall have been weighed and duly credited to the employee sending the same to the surface," and by which it is also provided that "any contract between mine owners, etc., and miners, whereby the provisions of the act are waived, modified, or annulled, shall be void and of no effect," has been sustained by the Supreme Court against the objections that it improperly infringes the right of contract, and that it denies the equal protection of the laws.²

plain that, if one deals with a corporation, he can only make such valid contracts with it as the law may authorize it to make. He cannot complain that the powers of such company to contract are limited, and less than those of a natural person. If this law is valid as to corporations, the laborers who deal with such corporations have no right to complain, and much less does the corporation have the right to complain that the law infringes upon the contractual powers of its employees. We are not called on in this case to decide whether this statute is valid as against owners and operators of coal mines other than corporations. It is sufficient to say that we are of the opinion that so much of the statute as is questioned in this case is valid as to corporations owning and operating coal mines in this state."

² *McLean v. Arkansas* (1909) 211 U. S. 539, 53 L. ed. 315, 29 Sup. St. Rep. 206, affirming (1906) 81 Ark. 304, 126 Am. St. 1037, 98 S. W. 729, 11 Ann. Cas. 72. After quoting the provision with regard to screening, the court proceeded thus: "The objection upon the ground of interference with the right of contract rests upon the inhibition of contracts which prevent the miner employed at quantity rates from contracting for wages upon the basis of screened coal instead of the weight of the coal as originally produced in the mine. If there existed a condition of affairs concerning which the legislature of the state, exercising its conceded right to enact laws for the protection of the health, safety, or welfare of the

people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail. . . . Conditions which may have led to such legislation were the subject of very full investigation by the industrial commission authorized by Congress by the act of June 18, 1898, chap. 466, 30 Stat. at L. 476. Volume 12 of the report of that commission is devoted to the subject of 'Capital and Labor Employed in the Mining Industry.' In that investigation, as the report shows, many witnesses were called and testified concerning the conditions of the mining industry in this country, and a number of them gave their views as to the use of screens as a means of determining the compensation to be paid operatives in coal mines. Differences of opinion were developed in the testimony. Some witnesses favored the 'run of the mine,' system, by which the coal is weighed and paid for in the form in which it is originally mined; others thought the screens useful in the business, promotive of skilled mining, and that they worked no practical discrimination against the miner. A number of the witnesses expressed opinions, based upon their experience in the mining industry, that disputes concerning the introduction and use of screens had led to frequent and sometimes heated controversies between the operators and the miners. This condition was testified to have been the result, not only of

b. Colorado.—In answer to questions submitted by the legislature to the supreme court, while a bill with regard to the weighing of coal was under consideration, it was laid down that in so far as that bill attempted to restrict the right of contract between parties in regard to matters personal to themselves, and to deprive them of the power to fix the mode in which compensation for mining coal should be ascertained, it violated the clauses of the Federal Constitution which prohibit the taking of property without due process of law, and the abridging of the privileges and immunities of citizens.³

c. Illinois.—Provisions requiring the owner, agent, or operator of a coal mine to furnish scales, to weigh thereon all coal before or at the time of its being loaded on the cars, and to keep a record of the

the introduction of screens as a basis of paying the miners for screened coal only, but, after the screens had been introduced, differences had arisen because of the disarrangement of the parts of the screen, resulting in weakening it, or in increasing the size of the meshes through which the coal passed, thereby preventing a correct measurement of the coal as the basis of paying the miner's wages.

"We are unable to say, in the light of the conditions shown in the public inquiry referred to, and in the necessity for such laws, evinced in the enactments of the legislatures of various states, that this law had no reasonable relation to the protection of a large class of laborers in the receipt of their just dues and the promotion of the harmonious relations of capital and labor engaged in a great industry in the state.

"Laws tending to prevent fraud and to require honest weights and measures in the transaction of business have frequently been sustained in the courts, although in compelling certain modes of dealing they interfere with the freedom of contract. Many cases are collected in Mr. Freund's book on 'Police Power,' wherein that author refers to laws which have been sustained, regulating the size of loaves of bread when sold in the market; requiring the sale of coal in quantities of 500 pounds or more, by weight; that milk shall be sold in wine measure; and kindred enactments. § 274.

"Upon this branch of the case it is argued for the validity of this law that its tendency is to require the miner to

be honestly paid for the coal actually mined and sold. It is insisted that the miner is deprived of a portion of his just due when paid upon the basis of screened coal, because while the price may be higher, and theoretically he may be compensated for all the coal mined in the price paid him for screened coal, that practically, owing to the manner of the operation of the screen itself, and its different operation when differently adjusted, or when out of order, the miner is deprived of payment for the coal which he has actually mined. It is not denied that the coal which passes through the screen is sold in the market. It is not for us to say whether these are actual conditions. It is sufficient to say that it was a situation brought to the attention of the legislature, concerning which it was entitled to judge and act for itself in the exercise of its lawful power to pass remedial legislation." Commenting upon the second objection, the court said: "There is no attempt at unjust or unreasonable discrimination. The law is alike applicable to all mines in the state employing more than ten men underground. It may be presumed to practically regulate the industry when conducted on any considerable scale. We cannot say that there was no reason for exempting from its provisions mines so small as to be in the experimental or formative state, and affecting but few men, and not requiring regulation in the interest of the public health, safety, or welfare."

³ *Re House Bill, No. 203* (1898) 21 Colo. 27, 39 Pac. 431.

coal as thus weighed, were annulled both on the ground that they conflicted with the clauses of the state Constitution which declare that no person shall be deprived of property without due process of law, and that private property shall not be taken or damaged for public use without just compensation,⁴ and on the ground that, without any

⁴ *Millett v. People* (1886) 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631 (act of June 29, 1885, amending act of June 14, 1883). After citing the statement in Cooley, Const. Lim. 1st ed. pp. 352-353, that the phrase "due process of law" is synonymous with the phrase "law of the land," which imports, "general public law, binding upon all the members of the community, under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals," the court proceeded thus: "What is there in the condition or situation of the laborer in the mine to disqualify him from contracting in regard to the price of his labor, or in regard to the mode of ascertaining the price? And why should the owner of the mine, or the agent in control of the mine, not be allowed to contract in respect to matters as to which all other property owners and agents may contract? Undoubtedly, if these sections fall within the police power, they may be maintained on that ground; but it is quite obvious that they do not. Their requirements have no tendency to insure the personal safety of the miner, or to protect his property, or the property of others. . . . But it is suggested, in argument, that one purpose of the sections is to furnish needful information to the public. If that be so, then, under § 13, article 2 [of the state Constitution], there must first be made compensation to the owner of the property thus to be devoted to public use; for it must be too apparent to need argument in its support that to compel the purchasing of scales, and the employing of a person to use them, for the benefit of the public, is to appropriate the private property, i. e., the money which this will cost, to public use." The contention of counsel that mining for coal is affected with a public use was thus dealt with: "It cannot be claimed that mining for coal was, by the common law, affected with a public use, and therefore specially regulated by law, like the business of innkeepers,

common carriers, millers, etc.; and, in our opinion, it is not, like the business of public warehousing, within the principle controlling such classes of business. The public are not compelled to resort to mine owners any more than they are compelled to resort to the owners of wood or turf, or even to the owners of grain, domestic animals, or to those owning any of the other ordinary necessities or conveniences of life which form a part of the commerce of the country. The owner of a coal mine is under no obligation to obtain a license from any public authority, and therefore when he chooses to mine his coal, he exercises no franchise. . . . We recognize fully the right of the general assembly, subject to the paramount authority of Congress, to prescribe weights and measures, and to enforce their use in proper cases; but we do not think that the general assembly has power to deny to persons in one kind of business the privilege to contract for labor, and to sell their products without regard to weight, while at the same time allowing to persons in all other kinds of business this privilege, there being nothing in the business itself to distinguish it in this respect from any other kind of business; and we deny that the burden can be imposed on any corporation or individual not acting under a license or by virtue of a franchise, of buying property and hiring labor merely to furnish public statistics, unless upon due compensation to be made therefor. So far as the owner or operator of a mine shall contract for the mining of coal or the selling of coal by weight, we see no objection to the statute as imposing upon him the duty of procuring scales for that purpose. But we do not think that he can be compelled to make all his contracts in these respects to be regulated by weight, and when he has no necessity for the use of scales in these respects, he cannot, in our opinion, be compelled to keep and use them." The statutes to which this decision relates were repealed and replaced by others expressed

warrantable ground for such special legislation, they deprived the persons affected of the right of making contracts.⁵ The very general provision in a still more recent statute, to the effect that persons engaged in mining coal shall be paid in lawful money of the United States for all coal mined and loaded, "at such price as may be agreed upon by the respective parties," has been held valid, for the reason it leaves the employer and employed free to contract with each other upon any terms that they may think proper.⁶

in somewhat similar terms. These also were pronounced unconstitutional.

In *Jones v. People* (1884) 110 Ill. 590, the objection that § 2 of the act, as it stood prior to the amendment, was invalid, as depriving coal operators of their right to make special contracts, was rejected on grounds thus stated: That act "leaves it free for the owner or operator of a coal mine to make contracts with his employees to mine coal for whatever may be agreed upon between them,—by the day, week, month, year, or by the box, or in any other manner that may be agreed upon between them. Where the contract is for the paying of wages in some other way than according to the weight of the coal dug, the purpose of the act would seem to fail, and its provisions not to apply."

⁵ In *Ramsey v. People* (1892) 142 Ill. 380, 17 L.R.A. 853, 32 N. E. 364, the court, referring to the provision in the act of June 10, 1891, by which it was declared that the owner, agent, or operator of a coal mine, in which the miner was paid on the basis of the amount of coal mined and delivered by him, should weigh the coal before it was screened, argued as follows: "In all other kinds of business, involving the employment of labor, the employer and employee are left free to fix by contract the amount of wages to be paid and the mode in which such wages shall be ascertained and computed. This is justly regarded as a very important right, vitally affecting the interest of both parties. To the extent to which it is abridged, a property right is taken away. There is nothing in the business of coal mining which renders either the employer or employee less capable of contracting in respect to wages than in any of the other numerous branches of business in which laborers are employed under analogous conditions. There is

no difference, at least in kind, so far as this matter is concerned, between coal mining, on the one hand, and other varieties of mining, quarrying stone, grading and constructing railroads, and their operation when constructed, manufacturing in all departments, the construction of buildings, agriculture, commerce, domestic service, and an almost infinite variety of other avocations requiring the employment of laborers, on the other hand. Upon what principle, then, can those engaged in coal mining be singled out and subjected to restrictions of their power to contract as to wages, while those engaged in all these other classes of business are left entirely free to contract as they see fit? We think the attempt of the legislature to impose such restrictions is clearly repugnant to the constitutional limitation above referred to, and therefore void."

In *Harding v. People* (1896) 160 Ill. 459, 32 L.R.A. 445, 52 Am. St. Rep. 344, 43 N. E. 624, similar views were expressed. The court held that, as a basis of classification, the distinction between operators who sold their product at the mine to some shipper who shipped it away to the market, and those who themselves shipped their coal by rail or water, was purely arbitrary. It was furthermore declared that class legislation regulating the weighing of coal at mines is not authorized by Ill. Const. art. 4, § 29, which provides for laws to secure safety to coal miners.

⁶ *Whitebreast Fuel Co. v. People* (1898) 175 Ill. 51, 51 N. E. 853 (Laws 1897, p. 270, § 1). The court observed that, under the statute, "the agreement may be for a certain rate, according to the time employed or the quantity of coal mined, or upon any other basis. If the compensation is fixed by the amount of coal mined, the act leaves them free to determine the quantity of such coal upon any basis they may see

d. Indiana.—On the ground that a determination of the point was not necessary, the supreme court declined in one case to decide whether the earlier of the “coal screening acts” was constitutional.⁷

e. Kansas.—The enactment which provides that, where miners are employed at bushel, ton, or other quantity rates, the output of coal mined by them shall not be passed over any screen or other device which shall take any part from the value thereof before the same shall have been weighed and duly credited to the employees, and accounted for at the legal rate of weights, has been upheld as a proper exercise of the police power.⁸ In the case cited the contention that it was invalid, as being an infringement of the right of contract, was rejected on the ground that it did not purport to prevent operators of coal mines and their employees from making such agreements as they chose with regard to the footing on which compensation was to be paid.

f. Ohio.—The act of 1898 has been held to be an unwarrantable invasion of the right to make contracts.⁹

fit. It does not require that it shall be weighed or measured, or compel the parties to adopt any particular mode of ascertaining such quantity. The act does not require that the same price shall be paid for each of the different grades into which the coal may be divided, but only undertakes to require that the employer shall perform his contract by paying such price as may be agreed upon by the respective parties. We cannot ascribe to the legislature an intention to re-enact, in a somewhat different form, a provision designed to interfere with the freedom of contracting between citizens, and which has been uniformly held to be an encroachment upon the liberty and rights of the laborer and his employer.”

⁷ *Martin v. State* (1881) 143 Ind. 545, 42 N. E. 911.

⁸ *State v. Wilson* (1899) 61 Kan. 32, 47 L.R.A. 71, 58 Pac. 981, affirming (1898) 7 Kan. App. 428, 53 Pac. 371. The considerations upon which the court relied are thus stated in the syllabus written by it: “Information is by this means furnished to the miner by which he may act intelligently, and rest his demand for wages upon the calculated results of what he has accomplished in the past. It also affords the operator knowledge, from the use of which wages may be adjusted, based upon known facts. Such law is further beneficial in

that it supplies the public with statistics showing the total amount of coal produced in the state.”

⁹ In *Re Preston* (1900) 63 Ohio St. 428, 52 L.R.A. 523, 81 Am. St. Rep. 642, 59 N. E. 101, adverting to the admission of counsel that the legislature can interfere with the right to make contracts only “when it is required for the general welfare, and when it is promotive of public health or morals,” the court proceeded thus: “We have therefore to consider only the purpose of this enactment and the nature of the contract which it assumes to forbid. Its purpose is to terminate the rights heretofore universally recognized in this state, and often exercised, of determining by contracts voluntarily entered into between miners and operators the mode in which the basis of compensation to be made by the latter to the former should be ascertained. Counsel for the state expressly disclaim any authority in the legislature to determine the price to be paid for mining coal, and it is true that no such authority is assumed in this act. By the method of payment heretofore in use, in which compensation was determined upon the basis of screened coal, miners have become entitled to receive, and operators have become bound to make, compensation having regard to the skill and care exercised by the miner in the

g. Pennsylvania.—The statute entitled “An Act Requiring the Weighing of Bituminous Coal before Screening, and Providing a Penalty for the Violation Thereof,” has been held unconstitutional, as being an improper interference with the right of contract.¹⁰

h. West Virginia.—In the case cited below, the court was equally divided with regard to the question whether the act of 1891 was valid.¹¹ The judges who were in favor of answering this question in the affirmative took the position that the act was “passed with a view of cutting off opportunities for fraud, and therefore was fairly within the police power of the legislature.” They also held that it was not in conflict with the 14th Amendment of the Federal Constitution, either as abridging the privileges and immunities of the citizens, or as denying the employee the equal protection of the laws, or as depriving the employees of their property without due process of law. They expressed the opinion that this Amendment “was never intended to strike down the police power of the state, nor to control its exercise, except in cases where it (the act) amounts plainly to usurpation, and the wresting of private property from its legitimate owners without compensation.”¹² By the other members of the court it

prosecution of his work. The effect of the act is that the total compensation to be paid by an operator is to be determined by agreement, but that it must be paid to miners without discrimination on account of their skill and care. Why the general assembly selected this class of laborers for discrimination,—why they are deemed less entitled than others to compensation which encourages merit by rewarding it,—we do not know, nor inquire. For, however unjust to this class of laborers the act may be, we can inquire only whether the general assembly had power to pass it. It is suggested as the basis of the act, that frauds may be perpetrated in the screening and weighing of coal under the contracts heretofore entered into. To this suggestion it is sufficient to answer that if such danger exists it may well justify appropriate legislation for the prevention of such fraud. But this legislation does not seek to prevent fraud, nor to provide for the health or safety of those engaged in mining. Its sole purpose is to establish a uniform standard of compensation among those upon whom it operates. That is, so far as skill and care are concerned, it establishes a uniform standard of earning capacity. The standard thus to be es-

tablished for all must necessarily be that of the least efficient, since their efficiency cannot be increased by legislation. To withhold from merit its reward may be a favorite object of socialism, but it is inimical to the individual rights which are preserved by the Constitution. . . . This act may be invalid for other reasons; but our decision is placed upon the ground that it is an unwarranted invasion of the rights of miners and operators to make contracts by which the former shall be entitled to receive, and the latter obliged to make, compensation according to the value of the service rendered and received.”

¹⁰ *Com. v. Brown* (1898) 8 Pa. Super. Ct. 339.

¹¹ *State v. Peel Split Coal Co.* (1892) 36 W. Va. 802, 17 L.R.A. 385, 15 S. E. 1000.

¹² In § 2820, note 24, the reader will find same passages bearing upon this aspect of the case. The following remarks of Lucas, P., on the rehearing, may also be quoted: “There was one point urged in argument for defendant, which was not overlooked, but was not perhaps sufficiently dwelt upon in the opinion, and that was that the screening act only applies to persons,

was considered that the act was invalid as being an unjustifiable interference with the contractual rights of employers and employed, and was unfairly discriminative, in that it was applicable only to operators employing more than ten miners.¹³ The latter of these reasons, however, is described by the decision of the Federal Supreme Court referred to in subsec. *a*, *ante*.

companies, or corporations operating a coal mine in which more than ten miners are employed. It is urged that this is 'class legislation,'—a term so loosely and vaguely applied as to defy any critical analysis of its meaning. The distinction drawn in favor of the smaller operators would indicate that the legislature thought that the evils of fraud and danger of imposition did not extend to the smaller classes of operators, and hence the remedy was not extended to their employees."

¹³ English, J., stated his position in the following language: "It is a matter of history connected with the mining of coal that in digging coal a considerable percentage of slack is necessarily produced, and that the most skilful miner produces the least slack, and this is something the court may take judicial cognizance of; and, as every bushel of coal that is brought from the mine in an unsalable condition in the shape of slack results in a sacrifice of just so much of the operator's coal property, the operators of coal mines found it necessary years ago to adopt the use of the screen, not only to separate the worthless slack from the clean, merchantable coal, but they also found it necessary to weigh the coal after it was screened, as the true test of the value of each individual miner's services; otherwise, if the coal was weighed before it was screened, as it came from the mine, the miners who send out the bank car laden with the largest percentage of slack would receive the greater remuneration, because the slack would lie more compactly and weigh more than lump coal. Can the screen, under these circumstances, be regarded as a fraud which calls for the interposition of the police power of the state? Is it not rather the proper method of giving to the skilled miner what he is entitled to by reason of years of experience, instead of placing him on a par with the beginner, or really below the beginner, who is able to procure a small percent-

age of merchantable coal, and sends out the residue in the shape of slack? . . . The question suggests itself, What more complete confiscation of the operator's property could possibly be enforced than to have a large percentage of his coal mined and put out in a condition that would be utterly worthless to him, and in addition to that, to be compelled to pay the miner for his labor in producing it in that condition? To uphold, as constitutional, legislation which interferes with the private contracts of the operator with the miner, and prescribes that coal shall be weighed and paid for before it is screened or any opportunity is afforded to determine its quality and value, would appear to me to be on a par with legislation which would compel the owner of a stone or marble quarry, who had contracted with his employees to pay them for dressed stone of certain dimensions, to measure the blocks in the rough, as they came from the quarry, and pay, not only for the dressed stone, but for the spalls and waste that accrued in squaring the same in accordance with the contract, and would characterize as constitutional an act which would provide that the landowner who employs a sawmill man to go among his timber, and, according to the common expression, take it from the stump and convert it into merchantable boards and lumber, to measure and pay for the same as it came from the saw, including in the measurement, slabs, culls, sawdust, and particles torn away by the action of the saw, and would sanction a law which would compel a diamond to be paid for in the rough, before its qualities had been tested and developed by submitting it to the skilful hands of a lapidary. . . . The 7th section of the act providing for weighing coal before it is screened excludes from its operation any corporation, company, or person owing or operating a coal mine in which less than ten miners are employed, which results in this: that an

2822. Enactments regulating the rate of wages on public work.—

The constitutionality of this class of enactments obviously depends upon precisely the same consideration as those which determine the validity of provisions limiting the hours of labor on public work; and as the Federal Supreme Court has, in dealing with a provision of the latter type, pronounced in favor of the more comprehensive theory that legislative competency extends to the regulation of all branches of municipal administration (see § 2829, subsec. *b*, *post*), it is apparent that this theory must ultimately prevail with respect to statutes of the former description also. But as they stand, the decisions reviewed below are inconsistent.

a. Indiana.—The supreme court of this state has annulled a statute which provided that unskilled labor employed in public works of the state, or any county, city, or town, should receive not less than a specified sum per hour.¹ In support of the validity of the statute, it was argued that counties, cities, and towns are mere political and municipal subdivisions of the state, through which the government is administered; that the state has the power to fix the salaries of its officers, and the wages it will pay to its agents and employees; and that it consequently has the right to declare what rate of wages shall be paid to the agents and employees of a county, city, or town employed upon any public work. This reasoning the court declined to accept.² Other objections to which the statute was held to be open

operator only employing nine need not weigh the coal before it is screened, but one employing twelve must. Can anyone say why the operator should be allowed to weigh the coal after it is screened for the nine, and that he must weigh it previously for the twelve? Is not the danger of fraud as great to the individual miner in the one instance as the other? and is not one miner as much entitled to the benefit of the law (if it be beneficial) as another? And again, is there any good reason why the small operator should be allowed to obtain from his mine merchantable coal by using the screen before it is weighed, and the large operator be denied the privilege of thus testing the services of his employees, and obtaining merchantable coal for the wages he pays them? And why is it that the police power of the state should be invoked for the protection of the twelve, while the nine are left to work their way with fear and trembling,

and protect themselves from the alleged iniquities of the screen?"

¹*Street v. Varney Electrical Supply Co.* (1903) 160 Ind. 338, 61 L.R.A. 154, 98 Am. St. Rep. 325, 66 N. E. 895 (act of March 9, 1901). The work in question was done by an independent contractor; but, in view of the position taken by the court regarding the dual character of a municipal corporation, this circumstance was not one of the material elements, as it was in one of the New York cases reviewed below.

²The following remarks may be quoted: "While the counties, cities, and towns are political and municipal subdivisions of the state, they are not governmental agencies in such sense as to subject the management of their local affairs, involving the making of contracts for labor and material to be used upon local improvements, and the payment of the same out of the revenues of the county, city, or town, to the arbitrary and unlimited control of the legislature. They are corporations as

were, that through its operation a citizen might be deprived of his property without due process of law.³ And that, as it purported merely to fix the rate of wages to be paid for unskilled labor, it was class legislation of an unjustifiable character.⁴

well as political and governmental subdivisions and agencies, and, as such corporations, they have the power to make contracts by which the rate of compensation for property sold to them is fixed. With regard to such contracts for the purchase of property or the employment of labor, counties, cities, and towns stand much upon the same footing as private corporations; and they cannot be compelled by an act of the legislature to pay for any species of the property more than it is worth, or more than its market value at the time and in the place where it is contracted for. The power to confiscate the property of the citizens and taxpayers of a county, city, or town, by forcing them to pay for any commodity, whether it be merchandise or labor, an arbitrary price, in excess of the market value, is not one of the powers of the legislature over municipal corporations, nor the legitimate use of such corporations as agencies of the state. If an act compelled counties, cities, and towns to pay to all stone masons not less than \$2 per perch for stone to be used on any public work, when the market price of stone was but \$1.50 per perch, or to the brickmaker not less than \$12 per thousand for brick, when brick of the same quality could be bought for \$10 per thousand, or to the hardware merchant not less than 6 cents per pound for iron, when iron of the same quality could be had for 4 cents per pound, such legislation would shock every reasonable mind, and would be universally condemned as unwarranted and unconstitutional. For the same reasons, an act fixing the price of unskilled labor on all public works at not less than 20 cents an hour is a legislative interference with the liberty of contract by counties, cities, and towns, which finds no sanction or authority in the doctrine that counties, cities, and towns are municipal and political subdivisions of the state. . . . If the legislature has the right to fix the minimum rate of wages to be paid for common labor, then it has the power to fix the maximum rate. And if it can regulate the price

of labor, it may also regulate the prices of flour, fuel, merchandise, and land. But these are powers which have never been conceded to the legislature, and their exercise by the state would be utterly inconsistent with our ideas of civil liberty." In the very nature and constitution of things, legislation which interferes with the operation of natural and economic laws defeats its own object, and furnishes to those whom it professes to favor few of the advantages expected from its provisions.

³ The court said: "If the minimum price to be paid by municipal subdivisions of the state for unskilled labor on public works exceeds the rate at which such labor can be obtained by other persons at the same place, then the excess so paid for labor on public improvements is taken from the citizens assessed for such works, not by due process of law, but by a mere legislative fiat. The citizens of the state, who must, through assessments made upon their property, pay for the public works of counties, cities, and towns, are entitled to have such work done at such rate of wages as the local agents and official representatives of such municipal subdivisions of the state may be able to secure by contract. They cannot be required arbitrarily to pay higher wages than laborers employed on private works or improvements in their particular district demand, any more than they could be compelled by similar legislation to pay a minimum rate of wages to laborers employed by them in their private business. If the minimum rate fixed by the statute exceeds the market value of such wages, the excess is a mere donation exacted under color of law from the citizens liable to assessment for the public improvement, and bestowed upon the unskilled laborer."

⁴ The court said: "The laboring man of the state may, for some purposes, constitute a class concerning which particular legislation may be proper. This classification has been recognized and sustained in statutes requiring the payment of wages in lawful money of the United States, forbidding the assign-

b. New York.—With reference to a statute which has since been repealed, it was laid down that “a general law regulating the compensation of laborers employed by the state, or by officers under its authority, which disturbs no vested right or contract, is within the power of the legislature to enact, whatever may be said of its wisdom or policy.”⁵ This decision was treated as a controlling precedent in a case in which the provision of the present labor law to the effect that all laborers, workmen, or mechanics engaged upon public work shall receive not less than the prevailing rate of wages, was held to be valid, in so far as it relates to the immediate employees of the state or of a municipality. The *ratio decidendi* was that, in the administration of the affairs of the subdivisions of the state,—cities, counties, towns, and villages,—“the legislature is unrestrained unless by express provisions of the Constitution. . . . All of these agencies and employees in the several municipalities are doing the work of the state, which is the sovereign and master.” The position “that the legislature is without power to interfere with the agencies it has created for the government of the municipalities” was declared to be unsound, in view of “the fact that the legislature has the power at any time to absolutely change the form of government of a municipality, to blot out of existence any municipal charter, or to consolidate several municipalities under a single charter.”⁶ On the other hand, that provision has been pronounced void, in so far as it purports to limit the right of independent contractors to fix the amount of compensation to be paid to persons employed by them in such work.⁷

ment of future and unearned wages, and in similar acts. But no legal and sufficient reason can be assigned for placing unskilled labor in a class by itself for the purpose of fixing by law the minimum rate of wages at which it shall be employed by counties, cities, and towns on their public works. Why exclude the skilled mechanic from the benefit of the act? Why compel the payment of a higher rate of wages to the unskilled laborer than may be demanded by the skilled mechanic for more difficult and important work, requiring special training, experience, and a higher degree of intelligence. . . . No sufficient reason has been assigned why the wages of the unskilled laborer should be fixed by law, and maintained at an unalterable rate, regardless of their actual value, and that all other laborers should be left to secure to

themselves such compensation for their work as the conditions of supply and demand, competition, personal qualities, energy, skill, and experience may enable them to do.”

⁵ *Clark v. State* (1894) 142 N. Y. 101, 36 N. E. 817 (Laws 1889, chap. 380).

⁶ *Ryan v. New York* (1904) 177 N. Y. 271, 69 N. E. 599. Referring to the case cited in the following note, the court remarked: “It is true that in one of the prevailing opinions, argument sufficiently broad to cover this case is made, but it is not necessary for the decision, and is *obiter*, and therefore need not be followed. Our conclusion is that so much of the statute as is involved in this case is constitutional.”

⁷ *People ex rel. Rodgers v. Coler* (1901) 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716, affirm-

The court declined to accept the theory that the statute was "a mere direction by the sovereign authority to one of its own agencies to contract in certain cases in a particular way."⁸ The following special reasons were also assigned for the decision: (1) That in its actual operation the statute permitted and required the expenditure of the money of the city, or that of the local property owner, for other than city purposes, and thus contravened the provision of the state Constitution, under which municipal expenditures are limited to those purposes;⁹ (2) that it invaded rights of liberty and property, in

ing (1900) 56 App. Div. 98, 67 N. Y. Supp. 701 (Laws 1897, chap. 415, as amended by Laws 1899 chap. 567). The case of *Clark v. State*, *supra*, was declared not to be in conflict with the conclusion arrived at. "All that this case decided was that the state had power to declare by statute the compensation to be paid to its own employees in the absence of any agreement providing for a different rate. But the right to make contracts for the compensation to be paid, whether greater or less than the statutory rate, is expressly recognized and conceded throughout the opinion; and it is obvious that under the Constitution the right could not be abrogated, since the power to employ labor is conferred by that instrument upon the superintendent of public works. The power to employ implies the power to agree upon the compensation; and while the statute was applied to cases where no such agreement was made, it could not deprive the superintendent of the power conferred upon him by the Constitution." The court cited with approval *State v. Norton* (1897) 5 Ohio N. P. 183, in which a city ordinance enacting that laborers should receive not less than \$1.50 a day, and that the day should not exceed eight hours, was declared void. In the opinion of O'Brien, J., it is laid down that, "with respect to property and contract rights of exclusively local concern, the state has no right to interfere and control by compulsory legislation the action of municipal corporations. The people of the state at large, through their representatives, have no more authority to dictate to a city the form in which its contracts shall be framed or the wages that it shall pay to laborers, than they have to dictate to an individual what he shall eat, drink, or wear." But this state-

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ment needs some qualification, in view of the decision of the majority of the court in the *Ryan Case*, *supra*, where the learned judge delivered a dissenting opinion, in which he reiterated the above theory.

⁸ With regard to this contention (p. 819 of 52 L.R.A.), it was remarked: "It is true enough that a city is an agency of the state to discharge some of the functions of government, but these terms do not adequately describe its true relations to the state or the people. A municipal officer directing a local improvement is not the agent of the state. He is the agent of the city, and the city alone is responsible for his negligence or misconduct."

⁹ "The legislature," said the court, "cannot authorize or compel a city to give any of its money or property, or to loan its credit for any private purpose, nor to expend any of its money, directly or indirectly, for any other than city purposes. If the legislature should, by statute, require a city to enter into contracts which directly or indirectly secure benefits to private individuals, or particular classes of citizens, and not for purely city purposes, the statute would be void, as in conflict with the spirit, if not the letter, of the Constitution. All expenditures of money must be for city purposes and that alone, except so far as it is authorized to devote funds to the relief of the poor, or to charity, which may be said to be a city purpose in the largest sense. A statute which tends to divert the money or property of the city or that of the local property owners from strictly city purposes, and devotes it, directly or indirectly, to private interests, or to the interests of some class of persons as distinguished from the whole body, whether the transaction is made to assume the form of payments

that it denied to the city and the contractor the right to agree with their employees upon the measure of their compensation, and compelled them in all cases to pay an arbitrary and uniform rate, which was expressed in vague language, difficult to define or ascertain, and subject to constant change from artificial causes; ¹⁰ (3) that it invaded the property rights of the local landowners, who would ultimately have to bear the expense of the work in question; ¹¹ (4) and that it virtually confiscated all property rights of the contractor under his contract for breach of his engagement to obey the statute, and at-

of wages or something else, is in conflict with the spirit and policy of these provisions of the Constitution. *People ex rel. Dunkirk, W. & P. R. Co. v. Batchelor* (1873) 53 N. Y. 128, 13 Am. Rep. 480; *People ex rel. Bolton v. Albertson* (1873) 55 N. Y. 50. The legislature does not possess unrestricted power to bind a city hand and foot with respect to all its local business affairs. It cannot fix by statute the price which it must pay for materials or property that it may need, or the compensation that it must pay for labor and other services that it may be obliged to employ; at least, when such regulations increase the cost beyond that which it would be obliged to pay in the ordinary course of business. If it could do all these things, it could virtually dispose of all the revenues of the city for such purposes as it thought best, and local self-government would be nothing but a sham and a delusion."

¹⁰ In this connection the court observed: "The plain purpose and effect of the law in question was to deprive the city and its contractors of the exercise of all judgment and discretion in the matter of wages to be paid to workmen employed upon all public works. Both the city and the contractor are deprived by the statute of all power to deal with that question, and, consequently, of all power to protect most vital interests in that regard, by contract or otherwise. The right which is conceded to every private individual and every private corporation in the state, to make their own contracts and their own bargains, is denied to cities and to contractors for city work; and moreover, if the latter attempt to assert such right, the money earned on the contract is declared to be forfeited to the city without the inter-

vention of any legal process or judicial decree. The exercise of such a power is inconsistent with the principles of civil liberty, the preservation and enforcement of which was the main purpose in view when the Constitution was enacted. If the legislature has power to deprive cities and their contractors of the right to agree with their workmen upon rates of compensation, why has it not the same power with respect to all private persons and all private corporations? . . . It was once a political maxim that the government governs best which governs the least. It is possible that we have now outgrown it, but it was an idea that was always present to the minds of the men who framed the Constitution, and it is proper for courts to bear in mind when expounding that instrument. The power to deprive master and servant of the right to agree upon the rate of wages which the latter was to receive is one of the things which can be regarded as impliedly prohibited by the fundamental law, upon consideration of its whole scope and purpose, as well as the restrictions and guaranties expressed."

¹¹ The court said that these owners were "entitled to the benefit of the best judgment and discretion of the city officers in making the contract for the work. To the extent that such judgment and discretion is taken away by arbitrary enactments not in their interests, but in favor of opposing interests, their constitutional rights of liberty and property are invaded. When the expense of the improvement is enlarged beyond actual and reasonable cost under ordinary business conditions,—as it may be under the statute in question,—their property is taken without due process of law."

tempted to make acts and omissions penal which in themselves were innocent and harmless.¹² The opinion was also expressed that, although the law was passed with the intention of benefiting wage earners, it would in the end operate to their disadvantage.¹³

c. Washington.—It has been held that a municipal ordinance providing that the wages paid to laborers employed on work done by contract for the city shall not be less than a certain amount for a day of eight hours is constitutional.¹⁴

2823. Enactments regulating the rate of wages in private employments.—There is no doubt that, as a general rule, enactments of this description are unconstitutional, as being an improper invasion of

¹² "The contractor," said the court, "is a private individual, engaged in private business. When he enters into a fair and honest contract for some municipal improvement, that contract is property, entitled to the same protection as any other property. It is not competent for the legislature to deprive him of the benefit of this contract by imposing burdensome conditions with respect to the means of performance, or to regulate the rate of wages which he shall pay to his workmen, or to withhold the contract price when such conditions are not complied with in the judgment of the city. When he is not left free to select his own workmen upon such terms as he and they can fairly agree upon, he is deprived of that liberty of action and right to accumulate property embraced within the guaranties of the Constitution, since his right to the free use of all his faculties in the pursuit of an honest vocation is so far abridged. A statute which enables a city that has entered into a contract with him for the performance of some public work to receive and accept the fruits of his labor, and at the time refuse to pay for it, upon the ground that he omitted to pay the prevailing rate of wages to his workmen, though he paid all they asked, and all he agreed to pay, would seem to be an arbitrary interference with his liberty and property, and not within the legitimate sphere of legislation. It is not claimed that the statute has any relation to the public health, the public morals, the public safety, or any of the other objects within the scope of the police power."

¹³ "The law," said the court, "forbids

the contractor from paying a rate of wages other than what is called 'the prevailing rate,' although the laborer is willing to accept it. It calls for the payment, practically, on all occasions, of the highest market price, and hence must compel the contractor to employ only such workmen as are competent to earn the very highest rate of compensation. It makes no allowance for the various degrees of efficiency and capacity that must always exist in so large a part of the community. A person less competent than his neighbor, from whatever cause, cannot be employed, because a uniform rate must be paid, without taking into account the varying conditions of life and the degrees of capacity. Such a law may, indeed, benefit for a time the favored few who possess the largest capacity to earn the largest wages, and in this view it may be said that it provides only for the survival of the fittest. But the effect of the law must be that all those who are too young or too old, or for any other reason less competent than their neighbors, must be deprived of all opportunity to secure employment on all public works in their respective callings, and so the tendency of such legislation is to check individual exertion and to suppress industrial freedom."

¹⁴ *Re Broad* (1904) 36 Wash. 449, 70 L.R.A. 1011, 78 Pac. 1004, 2 Ann. Cas. 212; *Gies v. Broad* (1906) 41 Wash. 448, 83 Pac. 1025. These cases were decided on the authority of *Atkin v. Kansas* (1903) 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124. See § 2829, *b, post*.

the right of contract.¹ Their invalidity has been affirmed even as regards corporations whose charters are subject to amendment and annulment.²

But a provision in the Federal Act, which forbids an agent, attorney, or other person engaged in preparing, presenting, or prosecuting a claim for a pension under that act from demanding or receiving a greater fee than \$10 for his services, has been sustained against the objection, that it is an unconstitutional interference with liberty of contract.³

2824. Enactments requiring the payment of wages at certain intervals.—(See chapter xxix., *ante*.)—*a. Arkansas.*—The validity of the enactment which provides that corporations doing business in the state shall pay their employees semimonthly has been sustained against the objections (1) that it denies corporations the equal protection of the laws: (2) that it restricts the rights of employees of corporations to contract with them; and (3) that it deprives corporations of their property within due process of law.¹

¹ In *Street v. Varney Electrical Supply Co.* (1903) 160 Ind. 338, 61 L.R.A. 154, 98 Am. St. Rep. 325, 66 N. E. 895, (see subsec. *infra*), the court observed, *arguendo*: "It is not contended, and it could not be maintained, that the restrictions in this act upon the right of contract would be valid if the act applied to the work and affairs of private citizens. Even if no express provision of any constitution forbade such legislative interference with the right of contract, it would be void, for the reason that the authority to fix by contract the prices to be paid for property, including human labor, is not ordinarily within the domain of legislation. But such enactments are also held to be in violation of § 1, art. 1, of the state Constitution, securing to every citizen of the state the inalienable right to personal liberty and to the pursuit of happiness."

In *People v. Phyfe* (1890) 48 N. Y. S. R. 350, 20 N. Y. Supp. 461, it was assumed that the act in question (limiting the working hours of certain railway servants) would have been invalid if it had purported to fix the rate of their wages.

In the dissenting opinion delivered by O'Brien, J., in *Ryan v. New York* (1904) 177 N. Y. 271, 69 N. E. 599, it was remarked that "no one has yet contended that a law fixing the rates of wages for a private corporation would be good."

² In *Leep v. St. Louis, I. M. & S. R.*

Co. (1894) 58 Ark. 407, 23 L.R.A. 264, 41 Am. St. Rep. 109, 25 S. W. 75, an act providing for the payment of the wages of discharged servants was upheld (see § 2826, note 1, *post*), the court remarking: "We do not mean, by holding as we do, to intimate that the legislature can, by way of amendment, fix or limit the compensation of employees of railroad companies. That might seriously affect one of the principal charter rights of the companies, and thereby substantially impair the object of their incorporation. Such a power would be subversive of the right, and, when exercised to its fullest extent, would leave to the corporation the privilege of selecting its employees, without the right of contracting with them. An amendment to that extent would be manifestly unjust to the companies, and violative of the Constitution, which, while it grants the right to amend when, in the opinion of the legislature, the charter is injurious to the citizens, limits the right to do so to amendments that are just to the corporators. The act in question is not subject to that imputation. It is prospective in its operation, and leaves to the corporations the right of making contracts with their employees on advantageous terms."

³ *Erishie v. U. S.* (1894) 157 U. S. 160, 39 L. ed. 657, 15 Sup. Ct. Rep. 586.

¹ *Arkansas State Co. v. State* (1910) 94 Ark. 27, 27 L.R.A. (N.S.) 255, 140

b. California.—A statute which enacted that “every corporation doing business in the state should pay the mechanics and laborers employed by it on such day in each week or month as should be selected by such corporation” was held, on the authority of two earlier cases, to be applicable only in respect of cases in which the classes of employees in question were hired by the week or month, and for that reason to make a mere arbitrary classification, not founded upon natural differences, or differences defined by the Constitution.² Subsequently a statute which required that corporations should pay wages at least once a month, in lawful money of the United States, or in checks negotiable at their face value, which gave employees a preferential lien in respect of wages not paid, which provided for the re-

Am. St. Rep. 103, 125 S. W. 1001. The first of these objections was thus disposed of: The enactment “applies to all corporations. Within the sphere of its operation, all artificial persons are treated alike under like circumstances and conditions. Because the act only applies to corporations, and not to natural persons, it does not contravene the equal protection clause of the Federal Constitution. Nearly all legislation is special, either in the objects sought to be attained, or in its application to classes. And the general rule is that legislation does not infringe the constitutional right of equal protection where all persons, whether natural or artificial, of such class, shall be treated alike under like circumstances and conditions.” In answer to the second objection, the court, after mentioning some instances illustrative of the doctrine that the liberty of contract may be circumscribed by the legislature, observed: “But under this act the restriction of the employee’s right to contract is not direct. That restriction only applies to the corporations, and those dealing with them cannot complain of the incompetency of the corporations to make contracts which are inhibited by the law, any more than they could in making contracts with persons laboring under legal disabilities, or in contracting relative to subject-matters prohibited by law.”

² *Slocum v. Bear Valley Irrig. Co.* (1898) 122 Cal. 555, 68 Am. St. Rep. 68, 55 Pac. 403 (Stats. 1891, p. 195). The court pointed out that the effect of the statute was to create a lien in favor of laborers and mechanics employed by the

week or month, and not to those employed on other terms. Beatty, Ch. J., dissented on the grounds thus stated: “No rule of statutory construction is more firmly established than this: that if an act of the legislature is open to two constructions, one of which harmonizes with the Constitution and the other does not, the latter must be rejected. Now, whatever may be the more obvious meaning of the section above quoted, regarded by itself, and without reference to the constitutional limitations upon the power of the legislature, it cannot be denied that without doing violence to the language employed, it may be held to mean simply this: that every corporation employing laborers and mechanics is required to establish a regular pay day in each week or in each month, as it may elect, and on that day to pay all wages then earned and due, no matter what the term of employment. No reason can be given for rejecting this construction, except that in two cases formerly decided the law was otherwise construed. But in those cases the point here presented was not raised or considered. If it had been foreseen that the construction then adopted would have the result of nullifying the law, there can be no doubt that it would have been rejected in favor of the construction above suggested, which has always seemed to me the more reasonable of the two. Now that our attention is called to this unforeseen consequence of our former decision, it is not too late, in my opinion, to rectify the error.” The cogency of the argument will impress every reader.

covery of attorneys' fees in an action for the recovery of wages, and which forbade prohibited contracts for the payment of wages at intervals longer than that specified, was declared by the supreme court of the state to be unconstitutional as discriminating unlawfully against corporations, and as depriving both the corporation and their employees of their property without due process of law, by restricting their right of contracts.³ But this statute has been sustained by a Federal judge against the objections that it grants special privileges or immunities to a certain class of citizens, that it deprives corporations of their property without due proc-

³ *Johnson v. Goodyear Min. Co.* (1899) 127 Cal. 4, 47 L.R.A. 338, 78 Am. St. Rep. 17, 59 Pac. 304 (Stats. 1897, p. 231). The court said: "The corporation and the laborer are prohibited from making any contract whereby wages are to become due for a longer period than one month as a condition of employment, or by which the laborer is to be paid in anything except money or negotiable checks. The working man of intelligence is treated as an imbecile. Being over twenty-one years of age, and not a lunatic or insane, he is deprived of the right to make a contract as to the time when his wages shall become due. Being of sound mind and knowing the value of a horse, he is not allowed to make an agreement with the corporation that he will work sixty days and take the horse in payment. Business might be such that a corporation could not possibly pay wages without getting laborers who were willing to wait for their wages until the corporation could get money with which to pay them for marketing its products. The laborer might be interested in the corporation, or for some reason willing to wait until the corporation could pay him. Yet the parties, being able to contract and willing to contract, and desiring for the good of each other to contract, are by this statute forbidden to do so. . . . It is claimed that corporations are a class and that classifications can be made, and that a law is not unconstitutional if it affects all of a class. While this is true, yet the classification must be founded upon differences, either defined by the Constitution or natural, or which will suggest a reason which might naturally be held to justify the diversity of legislation. . . . In this case there can be no

reason why a corporation doing business in this state should have its property subjected to a lien, unless the property of other persons in the state under like circumstances is subject to the same kind of a lien, or why such corporations should be prohibited from making defenses which all other persons in the state may make, or why such corporations should pay attorneys' fees or fines in an ordinary action at law while all other persons under like circumstances are exempt from such attorneys' fees and fines, or why such corporations cannot create valid liens upon its property other than by a deed or mortgage duly recorded, while all other persons in the state may do so, or why such corporations shall be denied the privilege of making a contract as to the manner of payment of its employees while all other persons in the state, who are over twenty-one years of age, and not incompetent, may do so, or why laborers cannot make a valid contract as to the time when their wages shall become due, or the kind of property or money in which they shall be paid. It is said that corporations being the creatures of the state, and deriving their powers from their charters, the same power that created them may alter or amend their charters, or deprive them of rights originally given them. This is true as to certain purposes, but the legislature cannot, after creating a corporation, and while it exists, deprive it of the rights guaranteed to it by the Federal Constitution, nor deprive it of its right to resort to the courts of law, nor take its property without due process of law, nor subject it to unequal and oppressive burdens, nor deprive it of the equal protection of the laws."

ess of law, and that it denies to corporations the equal protection of the law, within the prohibition of the 14th Amendment to the Federal Constitution.⁴

c. Illinois.—An enactment requiring certain classes of corporations to pay wages weekly has been held unconstitutional as discriminating improperly between those enumerated and others which are organized for pecuniary profit and employ labor, and also as infringing the constitutional rights of the employees of the corporations affected.⁵

⁴ *Skinner v. Garnett Gold Min. Co.* (1899) 96 Fed. 735. The court remarked that the statute of 1891 was declared unconstitutional because of its arbitrary classification of laborers, according to which those who were employed by the week or month enjoyed advantages over those not so employed (see note 2, *supra*), and that the statute of 1897 did not make any such discrimination as the statute of 1891, but entitled all employees of corporations to the same remedies. The only question to be determined, therefore, was whether the statute of 1897 so discriminated between corporations and other persons as to render it unconstitutional for that reason. In the opinion of the court the statute did not contravene the principle of classification established by various decisions, to the effect that burdens different from those imposed upon the general public may be imposed upon corporations, provided the difference is based upon reasonable grounds, and is not merely an arbitrary selection.

⁵ *Braceville Coal Co. v. People* (1893) 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62. The court said: "It is undoubtedly true that the people, in their representative capacity, may, by general law, render that unlawful, in many cases, which had hitherto been lawful. But laws depriving particular persons or classes of persons of rights enjoyed by the community at large, to be valid, must be based upon some existing distinction or reason not applicable to others not included within its provisions. *Cooley, Const. Lim.* 391. And it is only when such distinctions exist that differentiate, in important particulars, persons or classes of persons from the body of the people, that laws having operation only upon such particular persons or classes of persons

have been held to be valid enactments." An illustration of the manner in which the statute affected employees was thus drawn from the conditions which had prevailed shortly before, as a result of the financial crisis through which the country had been passing. "It is a matter of common knowledge," said the court, "that large numbers of manufactories were shut down because of the stringency in the money market. Employers of labor were unable to continue production, for the reason that no sale could be found for the product. It was suggested, in the interest of employees and employers, as well as in the public interest, that employees consent to accept only so much of their wages as was actually necessary to their sustenance, reserving payment of the balance until business should revive, and thus enable the factories and workshops to be open and operated with less present expenditure of money. Public economists and leaders, in the interest of labor, suggested and advised this course. In this state and under this law no such contract could be made. The employee who sought to work for one of the corporations enumerated in the act would find himself incapable of contracting as all other laborers in the state might do. The corporations would be prohibited from entering into such a contract, and if they did so, the contract would be voidable at the will of the employee, and the employer subject to a penalty for making it. The employee would therefore be restricted from making such a contract as would insure to him support during the unsettled condition of affairs, and the residue of his wages when the product of his labor could be sold. The employees would, by the act, be practically under guardianship; their contracts voidable, as if they were minors; their right to freely contract

d. Indiana.—The statute providing that “every company, corporation, or association doing business in the state, shall, in the absence of a written contract to the contrary, be required to make full payment” at least once a month for work performed by its employees “engaged in manual or mechanical labor,” has been declared invalid, as denying the equal protection of the laws.⁶

Similarly, the statute which requires that every person, company, or corporation, employing any person to labor, shall make weekly payments for the full amount due for such labor, has been annulled for the reason that, in respect both of employers and employees, by interfering with the freedom of contract, it deprived citizens of their liberty and property without due process of law.⁷

for and to receive the benefit of their labor, as others might do, denied them.” It was urged that the section (9) of the general incorporation act, which provided that “the general assembly shall, at all times, have power to prescribe such regulations and provisions that shall be binding on any and all corporations formed under this act,” entered into and formed a part of the contract under which the grant of the corporate franchise was conferred upon the employing company; but the court said that the scope of this provision was qualified by art. II, § I, of the Constitution, to the effect that “no corporation shall be created by special laws, or its charter extended, changed, or amended, . . . but the general assembly shall provide, by general laws, for the organization of all corporations hereafter to be created.” It was considered that the manifest intention of this provision was to require not only the creation of corporations, but amendments to charters of those existing, to be made by general laws, applicable alike to all occupying like circumstances and existing under the same conditions. It necessarily followed that special acts, applying to particular corporations only, and not to the general body of corporations created under the act, would fall within the prohibition of this section.

⁶ *Toledo, St. L. & W. R. Co. v. Long* (1907) 169 Ind. 316, 124 Am. St. Rep. 226, 82 N. E. 757 (Acts 1885, p. 36). The court said that the provisions under review, “so far as they affect employers, only apply to ‘every company, corporation, or association;’ and, so far as their employees are concerned, only ap-

ply to those ‘engaged in manual or mechanical labor,’ thereby denying the right to such of their employees as are not ‘engaged in manual or mechanical labor.’ Employees of an individual, although engaged in manual or mechanical labor, are excluded from the benefit of said sections of the statute. They give to a certain class of employees of companies, corporations, and associations, the right to recover penalties and attorneys’ fees, but deny such right to the same class of employees of an individual engaged in the same business, under the same conditions. They impose new burdens on ‘every company, corporation, and association’ doing business in the state, while an individual engaged in like business, under like circumstances and conditions, is left without any such burden. This brings said sections within the rule declared in *Bedford Quarries Co. v. Bough* (1907) 168 Ind. 671, 14 L.R.A.(N.S.) 418, 80 N. E. 529, and the cases there cited, and upon the authority of said case we hold that they are unconstitutional.” This decision was followed in *Smith v. Ohio Oil Co.* (1909) 43 Ind. App. 735, 86 N. E. 1027.

⁷ *Republic Iron & Steel Co. v. State* (1903) 160 Ind. 379, 62 L.R.A. 136, 66 N. E. 1005 (act of February 28, 1899). The court reasoned thus: “Is the arbitrary denial of the right to exchange money for labor—one class of property for another—in matters which affect no public interest, an unwarrantable interference with the right of contract, and a depriving of the person of liberty and property without due process of law? The only rational grounds upon which

On the other hand, the enactment which provides that every employer engaged in mining, quarrying, or manufacturing, who shall fail, after demand of payment has been made, to pay employees at

it is claimed there may be legislative interference with freedom of contract for lawful purposes is in the exercise of that undefined, reserved force of the people known as the 'police power.' There is a divergence of view as to the proper scope and application of this power, but all authorities seem to agree that it may be exerted only on behalf of some general, public interest, as distinguished from individuals or classes; that is to say, to protect the public health, safety, morals, prevent fraud and oppression, and promote the general welfare. It is not to be invoked to protect one class of citizens against another class, unless such interference is for the real protection of society in general. As far-reaching and flexible as the power has often been held to be, it is nowhere claimed for it that it may override the Constitution, and strike down a right that has been solemnly and expressly guaranteed by the fundamental law." Two considerations were adduced by counsel for the purpose of justifying the statute; *viz.* (1) that wage earners are not upon equal footing with employers, and opportunities for oppression and consequent public suffering ensue; and (2) that thrift being beneficial to the community, it should be encouraged by enabling workmen to pay cash for current demands, which can only be done by requiring frequent payment of wages. The court replied that assuming these statements to be true, the circumstances adverted to did "not of themselves justify the arbitrary invasion of the personal rights and liberty of the citizen. Liberty to contract on one's own terms, to decide for himself his own employment; to buy and sell; to exchange one belonging for another,—are among the most valuable and cherished rights. . . . The obvious intention of the legislature was to make contracts for persons that they would not in all cases make for themselves, and to forbid the making of contracts that they would make. The laborer may be the chief sufferer. His labor may be the only means of supplying himself and family; but by this law he is denied the right to work, and another the right to

employ him, unless he can be paid once a week. Any law or policy that disables the citizen from making a contract whereby he may find lawful, needed, and satisfactory employment, is unreasonable. It may be that the workman will desire and request his employer, as conducive to economy and saving, to keep back all wages not needed for current necessities. Whether he leaves his surplus earnings with his employer, or deposits them with the building and loan association or with the savings bank, involves no public interest and affects no public concern. Yet, according to this statute, if, in a fair and open agreement, the employer 'neglects or refuses' to pay the full amount earned for a period of ten days after due, the chief inspector may, if he disapproves the arrangement (and upon his failure to act, any citizen of the state may), sue, without the consent and even over the protest of the workman, in the name of the state, and not only compel payment, but mulct the employer in a 50 per centum penalty for making an honest effort to favor his employee. The statute places the wage earners of the state under quasi guardianship. It classes them with minors and other persons under legal disability, by making their contracts void at the pleasure of a public officer. It tends to degrade them as citizens, by impeaching their ability to take care of themselves. It is paternalism, pure and simple, and in violent conflict with the liberty and equality theory of our institutions. It is no argument to say that our assumption is unreasonable, and that the inspector is not likely to interfere in such cases. Whether he will or not is unimportant. In discussing the constitutionality of the act in question, it is to be determined not by what has been done or is likely to be done under it, but what may be done under and by virtue of its authority. We do not assert that the legislature is powerless to regulate the payment of wages when the same are paid at unreasonable periods, or that a community composed largely of workingmen may be injuriously affected by unduly delayed payments, for these questions are not be-

least once a week, shall be liable not only for the full value of the labor, but for a penalty in respect of each day that the payment is overdue, and also for a reasonable attorneys' fee, has been pronounced constitutional.⁸ The contentions rejected were, that it unwarrantably interferes with the right of contract,⁹ and that it violates the section of the Indiana Bill of Rights, which prohibits the granting of privileges or immunities to any citizen or class of citizens, which, upon the same terms, do not belong to all.

fore us; but what we do hold is that this statute, which takes away from both the employer and employee, whether in the shop, in the store, or on the farm, all power to contract for labor, except upon terms of weekly payment of wages in cash, is an unreasonable, and therefore an unconstitutional, restriction." Referring to the contention that appellant, being an employer, and not an employee, could only raise such questions as involved the rights of employers, and that the constitutional right of a laborer to contract to do lawful work upon terms satisfactory to him could not be questioned or appropriated by an employer as a defense, the court said: "We are unwilling to admit that this is a proper case for the application of the rule, since we are unable to see how the result may be different, whether the laborer is disqualified from entering into a contract of employment, or the employer disqualified from making it. In either view, the contract which the parties decide to make is prevented, and both parties mutually and equally affected by the interdiction."

⁸ *Seelyville Coal & Min. Co. v. McGlosson* (1906) 166 Ind. 561, 117 Am. St. Rep. 396, 77 N. E. 1044, 9 Ann. Cas. 234 (Acts, 1887, p. 13). As to this decision see further in § 2823, *post*, *Macbeth-Evans Glass Co. v. Amama* (1911) — Ind. —, 95 N. E. 228.

⁹ In this connection the court said: "The case at bar cannot, as insisted by counsel for appellant, be ruled by the decision in *Republic Iron & Steel Co. v. State*, *supra*. The statute in controversy in this latter case and the one herein involved are materially different. The distinction between the two acts is palpable. The invalidity of the statute involved in *Republic Iron & Steel Co. v. State*, *supra*, was, by this court, attributed to the fact that the

act deprived both the employer and employee in all lines of labor of the right to contract for employment, except upon the condition that the wages earned by the employee should be paid weekly. The right of the legislature reasonably, or to a limited extent, to regulate the payment of wages, as is done under the statute in the case at bar, was not in that appeal denied by the court. It will be observed that the act of 1887 does not profess to restrict or abridge the right of contract, except as against its express requirement that the amount due the employee for labor shall be paid in lawful money of the United States. This is the only express provision thereof which prohibits the right to contract. The constitutional validity of this provision of the act was fully sustained by this court in *Hancock v. Yaden* (1890) 121 Ind. 366, 6 L.R.A. 576, 16 Am. St. Rep. 396, 23 N. E. 253.

. . . Under the provisions of § 1 of this statute the employers therein mentioned are required to pay to each of their employees the amount due him for labor at least semimonthly. This requirement to pay at the time prescribed by the statute only becomes mandatory upon the employer on the demand of the employee to whom the wages are due and owing. His right under the law to demand semimonthly the amount of wages then due him is a matter wholly optional with him. It is a right which he may exercise or not, as he chooses. In no manner does the statute require him to exercise this right against his own free volition." It should be observed, however, that the ground on which the *Yaden Case* was decided, *viz.*, that the legislature has power to enact laws "which operate to maintain and protect the medium of payment established by the sovereign power of the nation" (see § 2820, note 8, *ante*), was such as to render it an inappropriate

e. Kentucky.—It has been held that the statute which requires persons and corporation engaged in mining work to pay all employees on certain days in each month, unless prevented by unavoidable casualty, is not invalid, as being special legislation, in that its operation is limited to mine owners employing ten or more miners.¹⁰ Other objections which have been unsuccessfully taken to this statute are, that it is open to the objection of being class legislation, or of being an improper exercise of the police powers, that it interferes with vested rights, that it impairs the obligation of contracts, and that it operates so as to impose a penalty for the nonpayment of debt.¹¹

f. Massachusetts.—In answer to a question submitted to the supreme court, it was declared that, under the Massachusetts Constitution, which grants legislative power in respect of "all manner of wholesome and reasonable orders, laws, statutes, and ordinances," the general court was authorized to enact a statute requiring manufacturers, whether individuals or corporations, to pay the wages of their employees weekly. It was also laid down that such a statute would not be invalid, as being in conflict with the Declaration of Rights, or with the 14th Amendment of the Federal Constitution.¹²

precedent to adduce for the purpose of meeting the special objections advanced in the case under review.

¹⁰ *Com. v. Hillside Coal Co.* (1900) 109 Ky. 47, 58 S. W. 441. The court, after having observed that, in so far as the statute might discriminate in favor of wage earners engaged in mining work or industry, it simply followed the lead of § 244 of the Kentucky Constitution, which provides that all wage earners employed in factories, mines, workshops, or by corporations, shall be paid for their labor in lawful money, proceeded thus: "When we look to the purpose in view in the adoption of such legislation, we think the classification or apparent discrimination made in the statute is permissible, because it is natural and reasonable, and, moreover, entirely consistent with the end sought to be accomplished by the organic law. The abuse sought to be corrected was the imposition practised on the miners by the operation of mines for forcing them, directly or indirectly, into dealing with the 'company stores,' where goods at exorbitant prices were paid for wages instead of money. This evil can hardly be practised at small concerns, or where less than ten miners are employed. In effect, the lawmakers

said there is in small concerns using less than ten men practically no such evil as the Constitution seeks to suppress; therefore we ignore the small concerns, and apply the benefit of the constitutional provision to that portion of the class only which needs the benefit. The organic law makes the general classification in the first instance, and this fact cuts short all discussion of its constitutionality which might otherwise grow out of the special application to miners. The statute then creates a class within a class, and this is allowable if based on reasonable, natural, and consistent grounds."

¹¹ *Com. v. Reinecke Coal Min. Co.* (1904) 117 Ky. 885, 79 S. W. 287 (Stat. 1903, § 2739a).

¹² *Re House Bill No. 1230* (1895) 163 Mass. 589, 28 L.R.A. 344, 40 N. E. 713. The opinion contains an instructive discussion of the extent of the power of the legislature to interfere with the liberty of contract. It was pointed out in *Republic Iron & Steel Co. v. State* (1903) 160 Ind. 379, 62 L.R.A. 136, 66 N. E. 1005, that the actual scope of the question to which this opinion was a reply was not whether the law regarding periodical payments, as it existed, was constitutional, but whether, assuming that

g. New York.—The provisions of the labor law by which railroad companies are required to pay wages twice a month have been upheld as being a proper exercise of the power to amend corporate charters which is reserved to the legislature in the New York Constitution. The court rejected the contention that they are invalid, as depriving those companies and their employees of liberty and property without due process of law, and as denying them the equal protection of the laws.¹⁸

the statute was valid as applied to corporations, it was constitutional to extend its provisions to individuals and partnerships. But for practical purposes the opinion may be regarded as embodying an expression of the views of the court with regard to the larger as well as the narrower question. For a case in which the validity of the statute was assumed after it had been passed, see *Com. v. Dunn* (1897) 170 Mass. 140, 49 N. E. 110.

¹⁸ *New York C. & H. R. R. Co. v. Williams* (1910) 199 N. Y. 108, 35 L.R.A. (N.S.) 549, 139 Am. St. Rep. 850, 92 N. E. 404, affirming (1909) 136 App. Div. 904, 120 N. Y. Supp. 1137, which affirmed 64 Misc. 15, 118 N. Y. Supp. 785. Willard Bartlett, J., in delivering the opinion of the court, said: "I think we must treat the requirement of the labor law that the employees of a steam surface railroad corporation shall be paid semimonthly and in cash as a restraint upon the freedom of such corporations to make any contract to pay the wages of their employees otherwise than semimonthly and in cash. If this were not the necessary construction, the legislation in question would present no serious constitutional difficulty. If we were at liberty to hold that the requirement for semimonthly cash payments was to apply only in cases where it was not stipulated otherwise in the contract of employment, neither the railroad companies nor their employees would have even any plausible cause for complaint, inasmuch as both master and servant would be left at liberty to make any contract they pleased in regard to the time when the servant's wages should be payable and the medium in which they should be paid. The substance of the grievance which is asserted in behalf of the corporations in this litigation is that they are left no option in the matter, but must pay in

the method and medium prescribed, although their employees might be entirely willing to agree otherwise. Their contention is that the labor law deprives them of the right of making contracts with their employees on advantageous terms, and that this is beyond the power of the legislature. Of course, if there is no power in the legislature thus to limit the right of contract between steam surface railroad corporations and their employees, this legislation must fail." After having stated the various grounds upon which the validity of the provisions in question has been attacked, the learned judge continued thus: "In the view which I have taken of the case, I shall proceed to consider only the question of its validity as warranted by the reserved power to amend. It is true, as has already been pointed out, that the statutory requirement of semimonthly payments applies to every person as well as to every corporation operating a steam surface railroad, thereby referring, no doubt, to the operation of short branch lines by individuals or partnerships in connection with the great railroads of the state, for convenience in sending freight to and from the premises of extensive manufacturing concerns. Such branch lines are only incidental to the general railroad business of the state, and the number of employees thereon must be comparatively few. The constitutionality of the statute is not questioned here by any individuals operating lines of this character, and even if the enactment should be deemed unconstitutional so far as persons are concerned, the provision relating to them is readily separable from the rest of the statute relating to corporations, and its invalidity in this respect, if so adjudged, need not affect the application of the provision to steam surface railroad corporations. *Berea College v. Kentucky* (1908) 211

h. Ohio.—The statute requiring that certain designated classes of employers should make payment of wages twice a month has been declared invalid,¹⁴ the ground of the annulment being, as was stated in a subsequent case,¹⁵ that it was an infringement of the liberty of contract.

i. Rhode Island.—The statute requiring all corporations, with the exception of certain specified classes, to make weekly payments of wages, has been declared valid, as being a legitimate exercise of a reserved power to amend corporate charters.¹⁶ The court was of opinion that the clause excepting certain descriptions of corporations from the purview of the enactment did not create an unlawful dis-

U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33. It matters not that both provisions are contained in the same section. *Loeb v. Columbia Twp.* (1900) 179 U. S. 472, 490, 45 L. ed. 280, 290, 21 Sup. Ct. Rep. 174. . . . In the case of corporations such as railroad companies, which are clothed to some extent with a public trust and are under an obligation to discharge duties which affect the community at large, the legislature may make amendments in furtherance of the public interest for the benefit of their employees, even though such amendments operated as limitations upon the exercise of the right to contract. Such is substantially the doctrine enunciated in the case of *St. Louis, I. M. & S. R. Co. v. Paul* (1898) 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419 [see § 2826, note 1, *post*] . . . The semimonthly payment clause of the labor law, being applicable to all steam surface railroad corporations in the state, operated as a repeal of all the charters of such corporations, if there were any, which provided for a different time of payment for employees, and as an amendment or addition to all charters in which no time of payment was prescribed. . . . The discussion thus far has related to the contention of the appellant that the enactments in question deprive the parties of liberty and property without due process of law. The objection that they operate as a denial of the equal protection of the laws is equally untenable. A classification of corporations with reference to their relations to the public is manifestly reasonable. No other corporations occupy precisely the same relation to the public as steam surface railroad companies, and the fact that no other corporations may have been

subjected to the same requirement in respect to the payment of wages does not invalidate the requirement. As long as the classification has a basis in reason and all corporations of the same class are treated alike, the action of the legislature may not be condemned by the courts for inequality."

¹⁴ *State v. Lake Erie Iron Co.* (1895; Ohio Sup. Ct.) 33 Ohio L. J. 6 (No off. rep.)

¹⁵ *Palmer v. Tingle* (1896) 55 Ohio St. 423, 45 N. E. 313.

¹⁶ *State v. Brown & S. Mfg. Co.* (1892) 18 R. I. 16, 17 L.R.A. 856, 25 Atl. 246 (act of March 4, 1891, P. L. chap. 918). The court said: "It is a matter of common knowledge that while corporations, owing to this very corporate power of aggregating capital, are the richest and strongest bodies, as a rule, in the state, their employees are often the weakest and least able to protect themselves, frequently being dependent upon their current wages for their daily bread. If they get credit, they must pay for it, as others do; and in proportion to their inability to pay cash, and the risk in trusting them, they have to pay for the time indulgence they obtain. To save labor and expense many corporate pay rolls were made up but twelve or thirteen times a year, and sometimes, when corporate means were cramped, even less often, whereby employees were obliged to wait for their pay, and the longer they had to work the less it was worth to them. . . . But for the power granted by the legislature, corporations could not make any contract, and we can see no reason why the legislature, under its reserved power to amend charters, cannot limit the power to contract in the future, just

crimination, inasmuch as it applied only to corporations, and to all corporations of the same class or classes. Nor could its constitutionality be impeached on the ground that it interfered with the rights of employees to make such contracts with a corporation as they see fit. "Corporations are artificial bodies, and possess only such powers as are granted to them; and natural persons dealing with them have no right to demand that greater power should be granted to corporations in order that they may make other contracts with such corporations than the corporations are authorized to enter into."

j. Pennsylvania.—The statute requiring the payment semimonthly of wages earned in mining and manufacturing has been declared by courts of inferior jurisdiction to be invalid.¹⁷

k. Vermont.—It has been held the enactment of the statute requiring certain classes of corporations to pay the wages of their employees every week is within the scope of a reserved power to amend their charter as the public good may require; that it does not constitute an unjustifiable interference with the right of those corporations to make contracts; that it does not operate so as to deny them the equal protection of the laws; that it is not invalid as restricting the rights of employees to contract with them, or as infringing the rights of their stockholders; and that the objection that it operates unequally, because inapplicable to foreign corporations, is not available to domestic corporations, because the former corporations are amenable to the laws of a state in which they do business.¹⁸

as they might have fixed it in the original charter, if any reasonable purpose is to be subserved thereby. . . . The argument at the bar, that the power to contract, granted in the charter, was such property of the defendant that modifying or limiting it by the general assembly was taking away defendant's property without compensation, does not seem to us to be well founded. The property of a corporation that cannot be taken away by the general assembly through the exercise of its reserved power is such property as, upon the dissolution of a corporation, would belong to its creditors and stockholders, and not a privilege it derived from the creating power, and which it was agreed, upon accepting the charter, might be amended at will by the general assembly. It has been argued that chapter 918 would prevent contracts for payment by the piece or job. We do not so understand the act. If employees are

to be paid by a time standard, then they must be paid weekly; but if they are to be paid by the piece, then wages are not 'earned' until the piece is done; and the wages to be paid weekly are the wages 'earned' to within nine days of the date of payment." It was observed that, with rare exceptions, the decisions limiting the reserved power applied to cases affecting vested rights of property.

¹⁷ *Sally v. Berwind-White Coal Min. Co.* (1896; C. P.) 5 Pa. Dist. R. 316 (restriction of freedom of contract); *Com. v. Isenberg* (1895; Q. S.) 8 Kulp, 116 (statute held to impair obligation of contracts); *Bauer v. Reynolds* (1894; Pa. C. P.) 3 Pa. Dist. R. 502 (restriction of freedom of contract).

¹⁸ *Lawrence v. Rutland R. Co.* (1907) 80 Vt. 370, 15 L.R.A.(N.S.) 350, 67 Atl. 1091, 13 Ann. Cas. 475, Act of Dec. 9, 1906. With respect to the scope of the power to amend charters, the court relied mainly on *St. Louis, I. M. & S.*

As to the validity of provisions imposing upon employers who fail to pay wages at the prescribed intervals a liability for attorneys' fees and a penalty, see § 2828, *post*.

R. Co. v. Paul (1899) 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419. See § 2826, note 1, *post*. In reply to the contention of counsel that the right of the defendant to make contracts for the payment of wages was a part of the franchise granted, and, being vested, could not be disturbed by the amendment of its charter by the exercise of the police power, nor on any other footing, the court said: "That argument is untenable because it fails to note the reserved power to amend, which is a part of the charter contract, and no change within the scope of that power, which is limited to the requirements of the public good, can be said to impair the obligation of that contract, for the corporators must be taken to have assented in advance to all such changes. And that the act is within the scope of that power cannot be doubted, for its requirement, especially as far as it relates to the defendant and to the class to which it belongs, which are clothed with a public trust, and discharge duties of public concern, affecting the community at large, is promotive of the public good in protecting their employees to the limited extent it does. Nor does that requirement destroy, nor sensibly encroach upon, the right to contract, but only modifies that right, which is not absolute, but is subject, on general principles, to such reasonable restraint as the public good may require. It is the general right to acquire and possess property, and, by necessary implication, the general right to contract concerning it, that the Constitution protects. But that protection does not make those rights absolute in every particular. If it does, what becomes of the police power, which inheres in every free government, and is based on the maxim, *Sic utere tuo ut alienum non lædas*, which, as the Federal Supreme Court says, is of universal and pervading obligation, and a condition on which all property is held; that its application to particular conditions must necessarily be within the reasonable discretion of the legislative power; and that, when such discretion is exercised

in a given case by means appropriate and reasonable, not oppressive nor discriminatory, it is not subject to constitutional objection? *Orient Ins. Co. v. Daggs* (1899) 172 U. S. 557, 566, 43 L. ed. 552, 555, 19 Sup. Ct. Rep. 281. This doctrine is equally applicable here, for the reserved power with which we are dealing, like the police power, is, as we have said, limited by the requirements of the public good."

With regard to the objection that the statute denied to the defendant the equal protection of the laws, the court said: "It does not include all corporations doing business in the state; but it includes all of the particular class to which the defendant belongs; namely, all railroad corporations, and all other transportation corporations, and all telegraph, and all telephone corporations, and all incorporated express companies, and perhaps, some other public-service corporations. But it is not necessary to its validity that it should include all corporations doing business in the state; for, although class legislation, discriminating against some and favoring others, is prohibited, yet special legislation does not contravene the equality clause of the 14th Amendment, if, within the sphere of its operation, all persons within its provisions are treated alike in like circumstances and conditions. . . . Classification for such purposes is not invalid, because not depending on scientific or marked differences in things or persons, or in their relations. It is enough if it is practical, and it is not reviewable unless palpably arbitrary. *Orient Ins. Co. v. Daggs* (1899) 172 U. S. 557, 562, 43 L. ed. 552, 554, 19 Sup. Ct. Rep. 281."

The objection founded upon the restriction of the rights of employees was thus met: "The restriction of their rights is not direct, but results from the restriction of the defendant's rights; and as that restriction is good as to the defendant, the rights of its employees are not thereby infringed, for they have no right to demand greater liberty for the defendant in order that their liberty may be enlarged. *State*

2824a. Enactments requiring the payment of wages within a certain period after demand.—The invalidity of the Texas statute providing that, in the event of a railroad company refusing to pay its indebtedness to an employee within fifteen days of demand, "it shall be liable to pay such employee twenty per cent on the amount due him as damages," has been affirmed on the ground that it deprives railroad companies of their property without due process of law,¹ that it is not authorized by Const. art. 10, § 2, of the Texas Constitution requiring the legislature to adopt laws to correct abuses and prevent unjust discrimination in rates on railroads in the state; and that even if it were authorized by that clause of the Constitution, it would be objectionable as being special legislation.²

v. Brown & S. Mfg. Co. (1892) 18 R. I. 16, 17 L.R.A. 856, 864, 25 Atl. 246." With regard to the alleged infringement of the rights of the stockholders, the court said: Their property rights are no more absolute than are the property rights of others, but are subject to modification as theirs. All men can modify their property rights by contract, but no man can bargain away his right to contract at all concerning property, for that right is unalienable. Now, the defendant's stockholders did modify their property rights in the corporation by becoming stockholders therein, for thereby they must be taken to have assented to any and all amendments of the charter that come within the reserved power; and, as the act in question comes within that power, and amends the charter as far as it is inconsistent with it, and to that extent modifies property rights under it, they must be taken to have assented to that modification also.

¹ *Missouri, K. & T. R. Co. v. Braddy* (1911) — Tex. Civ. App. —, 135 S. W. 1059 (act of March 30, 1887).

² *San Antonio & A. P. R. Co. v. Wilson* (1892) 4 Tex. App. Civ. Cas. (Willson) 565, 19 S. W. 910. The court said: "Such legislation can only be sustained upon the theory that railway companies are public in every respect, and the legislature can regulate them, not only in matters relating to their public duties as public carriers, but in all their internal economy. . . . Article 10, § 2, of the state Constitution, declares that all railroads are public highways, and railroad companies common carriers; that the legislature

shall pass laws to regulate freight and passenger tariffs; to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and enforce the same by adequate penalties; and, to the further accomplishment of these objects and purposes, may provide and establish all requisite means and agencies, invested with such powers as may be deemed adequate and advisable. . . . There is no question as to the scope of this section of our Constitution. Its provisions necessarily refer to and contemplate all injuries to the public arising out of a violation of duties due by the railway company to the public, as a common carrier. Within this broad field, it rests with the legislature to determine what are those duties to the public, and what constitute abuses and injuries, and also what remedies are necessary to prevent them; and to decide whether the abuses shall be corrected through statutes which declare the act or acts to be a crime, punishable as such, or whether the act or acts shall be corrected through a civil action, with punitive damages. . . . But when we consider the relations of railway companies to their own servants, both as to contracts of employment and payment, we find a field in which special legislation has no right ordinarily to enter, and in which railways stand on the same footing with all other corporations or persons, and which cannot be contemplated or included within the scope of § 2, art. 10. The relation of master and servant must ever be purely voluntary, resting on contract of par-

ties. The employer and employee must always deal at arm's length. Their interest in making the contract is always adverse. The employee always seeks the highest wages for the least amount of work, and the employer the greatest amount of work for the least pay. Unquestionably, so long as men must earn a living for their families and themselves by labor, there must be, as there always has been, oppression of the working classes; yet the law has never undertaken, except in a limited extent and upon principles of pure justice, to lift them above the plane of equality, upon which all should stand alike before the law. Tiedeman, *Pol. Power*, 571. . . . We think the position taken by appellant is correct, and § 2, art. 10, contemplates only the public duties of railways, and excludes all right of interference with the employment or payment of their servants. But, conceding that the legislature has the right to enforce ordinary labor claims by penalties, it certainly cannot select a certain class for the exercise of such legislation. . . . We think that an exception that undertakes to single out a single class, and attach a penalty to a failure to pay one class of their creditors, is not 'the law of the land,' and cannot be sustained. In *Re Ziebold* (1885) 23 Fed. 791, 4 Am. Crim. Rep. 116. The proposition here is to single out railway companies, and attach a penalty of 20 per cent for failure to pay servants' wages. It is impossible to regard the excess beyond the amount of the debt other than a penalty. It is not resting on contract, but is a penalty or fine for punishment. It does not apply to telegraph, telephone or express companies, warehouses, elevators, mills, street railway, gas, and electric companies or hotels, nor to any of the various enterprises of public necessity, interest, and convenience to which it might properly be applied. . . . If the legislature desires to interfere at all in the enforcement of labor claims, it must do so by laws equal in their operation, and protecting alike the interest of employer and employee, for the law knows no favorites. It is to be observed that the act in question, providing for the payment of 20 per cent damages on the amount claimed, makes no allowance for disputes of the amount made by the company in good faith, nor for any circumstance, how-

ever justifiable, which might delay the payment within the time fixed, nor for any redress to the road for plaintiff's failure to establish his demand, nor for any right of the road to collect sums due it from its customers, where the same is necessary. If the legislature, for the purpose of enforcing the payment of employee's wages, can pass a law like this, imposing 20 per cent on the amount due, does it not imply a power to make it ten times the amount claimed? . . . It may be claimed that because railways are public highways, and the companies are common carriers, and their efficiency in public service largely depends on the promptness and fidelity of their employees, unless the employees are promptly paid it will lead to poor service, strikes, and consequent disaster to the interest of the public; that therefore the public interest demands their prompt payment. The great difficulty with this argument is to limit it. It extends with more or less force to every public enterprise and agency that contributes to public necessity and convenience. Again, if it be admitted that public interest requires prompt payment to prevent strikes and obtain good service, then the state should regulate the amount to be paid, for that is the most fruitful of strikes. Again, to regulate the amount implies a regulation of the quality and kind of labor; and, by an easy gradation, we get to the right of the state to put men in the various offices to operate and manage the roads (as in fact is largely done now by the courts); and then we would have reached all that is implied in the term 'government ownership of railways' without the state's having a dollar's interest therein. Be that as it may, we cannot see how the public interest can be subserved by a statute so unequal, special, and unjust as the one under consideration. Even in those writers by whom a distinction is drawn between employments connected with public service and those not so directly connected, and by whom it is claimed that, in the former class, the state may, in the exercise of police power, appoint a tribunal and compel all parties to submit their differences to it for adjustment, we find the claim is not only based on public welfare, but on the fact it is for the benefit of both parties, and not for the operatives alone." This case was cited as good

2825. Enactments relating to the seizure of wages by judicial process.

—(See chapter xxv., *ante*.)

a. Alabama.—In the case cited below the court rejected the contention that a statute exempting from attachment the compensation of resident employees to a specified amount was invalid by reason of the fact that the state Constitution allows a debtor to waive his exemptions.¹

b. Georgia.—A statute by which the situs of debts due to nonresidents is fixed for the purposes of attachment with regard to cases in which the creditor is seeking to subject to seizure wages earned in another state by an employee of a railway company having a line of railway in that state and in Georgia, and by which it is provided that the situs of the debt shall be at the residence of the garnishee in Georgia, has been held not to be unconstitutional, either as depriving the employee of his property without due process of law, or as an attempt to pass an act having extraterritorial effect.²

c. Illinois.—A statute entitled, "An Act to Subject the Salary and Wages of Officers and Employees of Counties, Cities, Etc., to Garnishment and Attachment," has been declared to be invalid as class legislation, for the reason that it placed on the municipal corporations named in the title certain burdens from which other municipal corporations in the same class were exempted, and discriminated against the officers of the municipalities specified, by making the salaries and wages liable to attachment or garnishment, while the officers of other municipal corporations of the same class were not so liable.³

cc. Indiana.—An enactment allowing resident householders an exemption of wages not exceeding \$600, and householders of another state an exemption of only \$25, has been held not to be invalid, as embodying an illegal classification.⁴

d. Kansas.—An enactment declaring that no personal property

law in *Gulf, C. & S. F. R. Co. v. Ellis* (1896) 165 U. S. 150.

¹ *Richardson v. Kaufman* (1905) 143 Ala. 243, 39 So. 368 (Code 1896, § 2038, as amended by Acts 1898-99, p. 37). The court observed that this fact "no more binds the legislature to provide a remedy by garnishment for the collection of debts as to which exemptions are waived than the legislature would be bound in the absence of all statutory and constitutional exemptions, and, of course, of all provisions for waiver, to provide a remedy by garnishment for the collection of debts. No

more in the former case than it would be in the latter, and not at all in any case, is the plenary power of the legislature in respect of providing, or withholding or withdrawing once provided, remedies for the collection of debts limited by the organic law."

² *Harvey v. Thompson* (1907) 128 Ga. 147, 9 L.R.A. (N.S.) 765, 119 Am. St. Rep. 373, 57 S. E. 104.

³ *Badenoch v. Chicago* (1908) 222 Ill. 71, 78 N. E. 31.

⁴ *Pomeroy v. Beach* (1897) 149 Ind. 511, 49 N. E. 370.

shall be exempt from garnishment or attachment for the wages of certain classes of employees has been sustained against the objection that it is special legislation.⁵

e. Minnesota.—With reference to the Constitution of this state, which contains an unqualified provision to the effect that “a reasonable amount of property shall be exempt from seizure or sale, for the payment of any debt or liability,” it has been held that the legislature has no power to except from the operation of an exemption law debts for liabilities due to certain classes of servants.⁶

f. Missouri.—A statute which provides that in a case where the sum demanded is not over \$200, and where the property sought to be reached is wages due to defendant from a railway company, garnishment shall not issue until the plaintiff has recovered judgment against the defendant, and which in such a case relieves the railroad company of the duty to answer, has been attacked as invalid legislation, but without success.⁷

⁵ *McBride v. Reitz* (1877) 19 Kan. 123.

⁶ *Tuttle v. Strout* (1862) 7 Minn. 465, Gil. 374, 82 Am. Dec. 108 (decision with reference to act of March 12, 1858).

⁷ *White v. Missouri, K. & T. R. Co.* (1910) 230 Mo. 287, 29 L.R.A. (N.S.) 874, 130 S. W. 325 (Mo. Rev. Stat. 1909, §§ 2427, 2478). The court said: “It is earnestly argued that the statute is vicious class legislation because it is in the interest of railroad corporations, shielding them as a class from the process of garnishment, while all other corporations and individuals are liable to that process. . . . It is said that if the statute is unconstitutional, it is immaterial whether its purpose be to protect one class or another,—the railroads or their employees,—and that is so. But when the validity of the statute is assailed on the ground that it is class legislation, it is important to ascertain what class is created, so that we can see whether there was legal justification for making the class. . . . In the case at bar, if the purpose of the statute in question was to create railroad companies into a class, to exempt them from the burden or from the inconvenience of answering as garnishees, no one would undertake to defend it as a reasonable classification. But who will undertake to say that the general assembly intended by this act to create

railroad companies into a privileged class, to exempt them from the common burden borne by everybody else? When, in the legislative history of this state, has the general assembly ever manifested such partiality to railroad companies as a class,—partiality in which there was no purpose but to favor the class, granting to them a special privilege without any conceivable benefit to the public? On the other hand, when we think of the employees, their peculiar helpless condition in the predicament contemplated by this statute, we see a very good reason for the classification. A man at home, or whose place of business is near his home, can attend the justice’s court when he is sued, and, either with or without an attorney, defend against an unjust suit. But if an unfair plaintiff has a small claim against a brakeman on a freight train, against which claim he knows there is or may be a good defense, he may watch a time when the brakeman is gone, give constructive notice by publication, seize his wages, and thus obtain an unconscionable advantage. Even if the publication was brought to the notice of the railroad employee, when perhaps he was 500 miles away from home, and could not leave his post of duty without sacrificing his position, it is easy to conceive how he would submit to wrong rather than undertake the expense and trouble of defending the suit for the

g. Nebraska.—An enactment declaring it to be unlawful to assign claims for wages for the purpose of enabling the assignor to avoid the effect of the exemption laws of the state has been held constitutional. The contention that it was class legislation was rejected on the ground

small amount involved,—small, perhaps, in comparison to the expense and trouble, though not small in comparison to his wages. . . . Without this statutory provision of garnishment a creditor would have no right to seize the wages of his debtor until after he obtained judgment on his debt; the statute granting the right may direct how and to what extent it may be used, and a person using the process given him by the statute has no right to complain of the restrictions or conditions imposed by the very same law that gives him the right. . . . We are satisfied that the class intended to be benefited by the act was of railroad employees, that the railroad companies are only relatively concerned, and if protected, it is so only incidentally, and in furtherance of the protection designed for the employees. And we are also satisfied that the well-known conditions that surround the employees of the railroad companies are sufficient to justify the general assembly in making a class of them for the purpose indicated. . . . It is argued that conceding the railroad employees constitute a class justifying special legislation in their behalf, this statute is bad because it does not embrace all railroad employees. . . . The argument is that this statute reaches only those railroad employees whose debts amount to \$200 or less, and that drawing the line at that maximum figure is arbitrary. If that fact creates a class within a class, it cannot be denied that the statute reaches everyone within that interior class. In point of fact, the statute applies to every railroad employee who is sued by attachment for the sum not exceeding \$200. It was evidently the purpose of the legislature to provide for cases when the amounts sued for were so small that the defendants could not afford to abandon their posts of duty and come at a great distance and expense to defend the suits. If that was the purpose of the law, the lawmaker had to draw the line at some point to designate what was considered a small amount; and wherever the line might

have been drawn, it would have been subject to the same criticism that is now made. If the line had been drawn at \$25 or \$50, it would not have protected one who was sued for \$26 or \$51. If the legislature had authority to pass a statute affording protection to the class of persons named, it had the authority to draw the line, and the courts have no authority to question the wisdom of their demarcation. A statute designed to shield the wages of a railroad employee without limit as to the amount sued for, shielding the salaries of the big as well as the wages of the little, could not stand, because there would be no reason or justice on its face. But a statute aimed to protect an employee from an abuse of the process of garnishment on a claim too small to justify him in leaving his post and coming a distance to make his defense has both reason and justice to support it; in fact, the statutes concerning garnishments, without this provision, would be a weapon that could be used to great injustice; and we doubt not that it was to prevent that abuse that this act was passed. We must remember that this act does not deprive the creditor entirely of the writ of garnishment in such case, but only postpones him until he gets a judgment on his claim. It is argued that this statute applies to all railroad employees, regardless of their station or the amount of their wages, the line being drawn only at the amount of the debt sued for, and that therefore it cannot be said that it was aimed to cover only the small wage earner. That is an argument on the letter rather than on the spirit of the law. *Qui hæret in litera, hæret in cortice.* Who can read this statute without seeing that it was to protect that class of small wage earners whose calling carried them away from home? and who can reflect on it without seeing that that is its practical effect? If the statute had gone on to specify the amount of wages the man was to earn in order to come within its terms, the same criticism that is now made in reference to the amount of the debt sued for would be made in ref-

that it was applicable to all those persons who fell within the purview of the laws exempting wages.⁸

2826. Enactments relating to the payment of wages at the time when the relationship of master and servant is terminated.—*a. Arkansas.*—By the Supreme Court of the United States the statute which provides that railroad corporations, whenever they discharge an employee, with or without cause, shall pay him, on the day of his discharge, the unpaid wages then earned at the contract rate, without abatement or deduction, has been upheld as a valid exercise of the power to amend corporate charters which is reserved to the legislature by the Arkansas Constitution. The grounds upon which the decision proceeded were that “corporations are the creations of the state, endowed with such faculties as the state bestows, and subject to such conditions as the state imposes; and if the power to modify their charters is reserved, that reservation is a part of the contract, and no change within the legitimate exercise of the power can be said to impair its obligation;” that, as the amendment in question “rested on reasons deduced from the peculiar character of the business of the corporations affected and the public nature of their functions, and applied to all alike, the equal protection of the law was not denied;” and that, as the act was “purely prospective in its operation,” it “did

erence to the amount of wages specified. If the statute drew the line at \$60 a month, the complaint would be that it excluded from its protection the man whose wages were \$61 a month. If the lawmaker thought that a station agent or a clerk in an office, or a man whose position was high enough to command a large salary, was not as apt to be subjected to the abuse that the statute was aimed to correct as the one whose duties called him away from home, and for that reason left the statute more general than it might have been, we cannot say that the conclusion was unreasonable, nor can we condemn the statute because possibly it might cover a case not contemplated. . . . It is argued also that this statute, by an arbitrary line, creates a class of preferred creditors, allowing those whose claims are for \$201 or more free to sue out a writ of garnishment, while excluding those whose claims are \$200 or less. Whatever may be said as to the effect of the statute, it certainly cannot be claimed that its purpose was to give one class of creditors a privilege

over another class. It is as difficult to imagine that the general assembly had in mind the intention to create a preferred class of creditors, drawing the line at \$201, as it is to imagine the intention to create a particularly preferred class consisting alone of railroad companies. The purpose of the statute was not to prefer a class of creditors or a class of railroads; and if the effect is to give an incidental preference to creditors whose claims are more than \$200, that consequence cannot defeat the statute, if its purpose was to accomplish an object which the general assembly had a right to accomplish, and in the main does accomplish.” The above case was followed in *Houston & T. C. R. Co. v. Caldwell* (1910) 231 Mo. 505, 132 S. W. 1067.

⁸ *Singer Mfg. Co. v. Fleming* (1894) 39 Neb. 679, 23 L.R.A. 210, 42 Am. St. Rep. 613, 58 N. W. 226 (Laws 1889, chap. 25), followed in *Gordon Bros. v. Wageman* (1906) 77 Neb. 185, 108 N. W. 1067; *Bishop v. Middleton* (1894) 43 Neb. 10, 26 L.R.A. 445, 61 N. W. 129.

not interfere with vested rights, or existing contracts, or destroy, or sensibly encroach upon, the right to contract.”¹ A point which the

¹ *St. Louis, I. M. & S. R. Co. v. Paul* (1899) 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419 (1897) 64 Ark. 83, 37 L.R.A. 504, 62 Am. St. Rep. 154, 40 S. W. 705.

The same doctrine had previously been enunciated by the supreme court of Arkansas in *Leep v. St. Louis, I. M. & S. R. Co.* (1894) 58 Ark. 407, 23 L.R.A. 264, 41 Am. St. Rep. 109, 25 S. W. 75. The following extracts from the opinion delivered for the court by Battle, J., may be quoted: “The legislature cannot regulate or restrain the right of individuals to contract by making it unlawful for them to agree with each other that wages shall be paid at any specified time subsequent to the day on which the labor by which they are earned shall be completed, or that the price of property sold shall be paid on a day subsequent to the sale. . . . The right of persons to sell or labor on a credit is everywhere and by all recognized as legitimate, and is protected by the Constitution in the declaration that the right to acquire and possess property is inalienable. But what is true of persons is not always true of corporations. Natural persons do not derive the right to contract from the legislature. Corporations do. They possess only those powers or properties which the charters of their creation confer upon them, either expressly, or as incidental to their existence; and these may be modified or diminished by amendment or extinguished by the repeal of the charters. . . . Being created by statute, the legislature may so change them by amendment as to make them subserve the purpose for which they were created. If the legislature, in its wisdom, seeing that their employees are and will be persons dependent on their labor for a livelihood, and unable to work on a credit, should find that better servants and service could be secured by the prompt payment of their wages on the termination of their employment, and that the purpose of their creation would thereby be more nearly accomplished, it might require them to pay for the labor of their employees when the same is fully performed at the end of their employment. If it be true that in doing so it would

interfere with contracts which are purely and exclusively private, and thereby limit their right to contract with individuals, it would nevertheless, under such circumstances, have the right to do so under the reserved power to amend.” Adverting to the fact that the provision in question was susceptible of two constructions, one of which made the act “require the corporation to pay the employee all the wages to which he would have been entitled had he fully performed his contract up to the time of his discharge, notwithstanding he had failed to do so, and had damaged the corporation thereby,” the learned judge said: “If this be its intention, it is unconstitutional, because its enforcement might take property from the corporation without due process of law. For the employee is not entitled to the stipulated wages until he has performed the contract. He may have damaged his employer, by the failure to do so, in a sum larger than the wages he would have been entitled to receive in the event he had complied with his agreement. To compel the corporation, in such a case, to pay any sum whatever, would be a deprivation of property without due process of law. . . . The other construction is more reasonable. It makes the words ‘without abatement or deduction’ mean ‘without discount.’ The legislature evidently thought that the employee might receive money or property in the course of his employment in part payment for his labor, and evidently intended that the wages thus paid should not be repaid. A strict construction of the words ‘without abatement or deduction’ would deprive the corporation of a credit for the money or property in a settlement with its employee for his services. Then, again, the act requires the corporation to pay only the unpaid wages earned, at the contract rate, at the time of his discharge. Stipulated wages cannot be earned except by the performance of the contract by which the employer agrees to pay them. Obviously, then, the act means, by the words ‘without abatement or deduction,’ that the unpaid wages earned at the contract rate at the time of the discharge shall be paid without discount on account of the

Federal tribunal did not advert to, but which was determined by the judgment of the supreme court of the state from which the appeal was taken, was, that the penalty imposed for the failure to comply with the statute, *viz.*, that the wages shall continue to accrue at the contract rate, until paid, but not for more than sixty days, unless suit is brought within that period, is not unreasonable.

b. Washington.—See § 2820, subsec. *o*, *ante*.

2827. Enactments prohibiting the assignment of wages to become due at a future date.—*a. Illinois.*—A provision to the effect that no assignment of wages or salary should be valid, unless made in writing, duly acknowledged, and within three days a copy thereof should be served on the person from whom the same is due, has been pronounced unconstitutional with reference to the “due process” clause of the Constitution. The *ratio decidendi* was that the provision limits “the right of persons earning the higher salaries to assign or transfer their salaries in such manner as they see fit, there being nothing in the public policy of the state requiring or warranting such abridgment of their right, and nothing requiring or warranting a statute giving to such persons the benefit that might with entire propriety be given to wage earners by an act in reference to the assignment of wages.”¹

payment thereof before the time they were payable according to the terms of the contract of employment. When construed in this manner, this provision of the act is constitutional, and it is our duty to so construe it.” Another contention rejected was that the act was unconstitutional because it interfered with the rights of employees to make such contracts with corporations as they see fit.

For a later case in which the above decisions were followed, see *Kansas City, P. & G. R. Co. v. Moon* (1899) 66 Ark. 409, 50 S. W. 996.

¹ *Massie v. Cessna* (1909) 239 Ill. 352, 28 L.R.A. (N.S.) 1108, 130 Am. St. Rep. 234, 88 N. E. 152. The court reasoned thus: “It is urged that wage earners compose a class of inhabitants of the state who, when they desire to borrow money and secure the same by the assignment of their wages earned or to be earned, become victims of men engaged in the business of loaning money at usurious rates, who are commonly denominated ‘loan sharks;’ that when the wage earner finds it necessary to borrow money upon such security he is unable to deal with the money

lender upon an even footing; that the latter is able to exact usury, and to practise various like wrongs and impositions upon him, by reason of his poverty and sometimes by reason of his improvidence, and that this creates a condition of affairs which the legislature may remedy by the exercise of the police power. While we think this evil exists, it is yet apparent, upon a careful examination of this statute, that it is too broad in its terms to be justified as an exercise of the police power for the purpose of mitigating or remedying the wrong at which it is aimed. It applies not only to wages, but also to salaries. ‘Wages,’ in its ordinary acceptation, has a less extensive meaning than ‘salary.’ ‘Wages’ is usually restricted to sums paid as hire or reward to domestic or menial servants, and to sums paid to artisans, mechanics, laborers, and others employed in various manual occupations, while ‘salary’ has reference to the compensation of clerks, bookkeepers, other employees of like class, officers of corporations, and public officers. 2 Standard Dict. p. 1573; *Re Stryker* (1899) 158 N. Y. 526, 70 Am. St. Rep. 489, 53 N. E. 525. In this

In the case cited another section of the same statute, which invalidated an assignment of wages or salary, made as security for a loan tainted with usury, or for the payment of a usurious contract, was also pronounced unconstitutional, because no such provision was made with reference to other instruments given to secure usurious debts.

b. Indiana.—An act which prohibits the assignment of wages to become due in the future has been upheld as a lawful exercise of the police power, on the ground that it was enacted for the purpose of protecting “wage earners from oppression, extortion, or fraud on the part of others, and from the consequences of their own weakness, folly, or improvidence.”² The contention that it is an unreasonable restraint upon the liberty of the citizen, and that it operated so as to deprive citizens of their property without due process of law, did not prevail.

c. Massachusetts.—In one case it was declared by the supreme court of this state that the enactment which provides that no assignment of future earnings, whether made by the assignor in person or by attorney, shall be valid, unless executed in writing, and for a period not exceeding two years from the date of the power of attorney under which the assignment is made, is “no doubt” valid.³

state salaries in excess of \$5,000 per annum are not unusual. It cannot be said that an officer of a corporation who is in the enjoyment of a salary of \$20,000 per annum is or may be the victim of the evil at which this statute is aimed, and yet his salary is plainly within the terms of the act. . . . The reasoning of the *Vogel Case* (1895) 157 Ill. 339, 30 L.R.A. 491, 42 N. E. 386, would seem to lead to the conclusion that wage earners are the proper objects of legislation which would tend to protect them from the evil which this statute is designed to obviate. Such an act would not be rendered invalid by the fact that it placed reasonable regulations upon the right to assign wages to secure an indebtedness, and prescribed a reasonable method to be pursued in making the assignment effective.”

² *International Text-Book Co. v. Weissinger* (1902) 160 Ind. 349, 65 L.R.A. 599, 98 Am. St. Rep. 334, 65 N. E. 521 (Ind. Acts 1899, p. 193, § 4). The court said: “A large proportion of the persons affected by these statutes of labor are dependent upon their daily or weekly wages for the

maintenance of themselves and their families. Delay of payment or loss of wages results in deprivation of the necessities of life, suffering, inability to meet just obligations to others, and, in many cases, may make the wage earner a charge upon the public. The situation of these persons renders them peculiarly liable to imposition and injustice at the hands of employers, unscrupulous tradesmen, and others who are willing to take advantage of their condition. Where future wages may be assigned, the temptation to anticipate their payment, and to sacrifice them for an inadequate consideration, is often very great. Such assignments would, in many cases, leave the laborer or wage earner without present or future means of support. By removing the strongest incentive to faithful service,—the expectation of pecuniary reward in the near future,—their effect would be alike injurious to the laborer and his employer.” This decision was followed in *Chicago & E. R. Co. v. Ebersole* (1909) — Ind. —, 87 N. E. 1090.

³ *McCallum v. Simplex Electrical*

Another provision to the effect that no assignment of or order for wages to be earned in the future, to secure a loan of less than \$200, shall be valid against the employer of the assignor until such assignment or order is accepted in writing by the employer; and that no such assignment or order, when made by a married man, shall be valid unless the written consent of his wife is attached thereto, has been declared by the same court, and also by the Federal Supreme Court, to be a proper exercise of the police power.⁴

It was also sustained against the particular objections that it deprives borrowers and lenders of their property without due process of law;⁵ that it makes a distinction between assignments to secure loans of money and assignments as security for necessities or other property furnished or to be furnished;⁶ and that it denies the equal protection of the laws, because certain classes of financial institutions are exempted from its purview,⁷ and that it makes the consent of the

Co. (1908) 197 Mass. 388, 83 N. E. 1108 (Stats. 1905, chap. 308).

⁴ *Mutual Loan Co. v. Martell* (1909) 200 Mass. 482, 484, 485, — L.R.A. (N.S.) —, 128 Am. St. Rep. 446, 86 N. E. 916, affirmed in (1911) 222 U. S. 225, 56 L. ed. 175, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913B, 529 (Mass. Stats. 1908, chap. 605). The state court, after having observed that the question to be investigated was the extent to which "the welfare of the community requires an interference by way of regulation with the right of workmen to dispose of their wages to be earned in the future," quoted the language of *International Text-Book Co. v. Weissinger* (see note 2, *supra*), and continued thus: "Without deciding, as the supreme court of Indiana did, that these considerations would furnish the legislature constitutional authority for forbidding all assignments of future wages, we think they justify a strict regulation of the right to make such contracts. The requirement that they be recorded is certainly reasonable. It tends to lessen the opportunity of wage earners to be dishonest in procuring credit on the faith of their expected possession of earnings, as they might be if unrecorded assignments were outstanding. The requirement that the order or assignment be accepted in writing by the employer tends to diminish the risk of his refusal to pay, involving litigation the result of which

might be loss of employment by the wage earner and injury to the business of the employer. Then, too, this requirement might operate as a check upon the rapacity of unscrupulous money lenders who are inclined to take advantage of the needs of employees. If the legislature saw an advantage to the community from this provision, we cannot say that they were acting beyond their constitutional authority in enacting the law." The Federal Supreme Court observed: "We cannot say . . . that the statute as a police regulation is arbitrary and unreasonable, and not designed to accomplish a legitimate public purpose. We certainly cannot oppose to the legislation our notions of its necessity, and we have expressed 'the propriety of deferring to the tribunals on the spot.' *Laurel Hill Cemetery v. San Francisco* (1910) 216 U. S. 358, 365, 54 L. ed. 515, 518, 30 Sup. Ct. Rep. 301."

⁵ Contention rejected by the Federal Supreme Court.

⁶ With reference to this contention, the state court remarked that "the occasions for making assignments as security for necessities may be far more pressing than for making them to obtain money, and the risk of wasting that which is obtained may be much less in one case than in the other."

⁷ Under this head the Federal Supreme Court made the following remarks: "We have declared so often

debtor's wife a condition precedent to the legality of the assignment.⁸ It was also pointed out by the Federal Supreme Court that "there are other grounds upon which the statute may be sustained than those expressed by the supreme judicial court of the state. As we have seen, it does not prohibit assignments of wages to be earned. It prescribes conditions to the validity of such assignments, and in this it has many examples in legislation. It has the same general foundation that laws have which prescribe the evidence of transactions and

the wide range of discretion which the legislature possesses in classifying the objects of its legislation that we may be excused from a citation of the cases. We shall only repeat that the classification need not be scientific nor logically appropriate, and if not palpably arbitrary, and is uniform within the class, it is within such discretion. The legislation under review was directed at certain evils which had arisen, and the legislature, considering them and from whence they arose, might have thought or discerned that they could not or would not arise from a greater freedom to the institutions mentioned than to individuals. This was the view that the supreme judicial court took, and, we think, rightly took. . . . But even if some degree of evil which the statute was intended to prevent could be ascribed to loans made by the exempted institutions, their exception would not make the law unconstitutional. Legislation may recognize degrees of evil without being arbitrary, unreasonable, or in conflict with the equal protection provisions of the 14th Amendment to the Constitution of the United States. *Ozan Lumber Co. v. Union County Nat. Bank* (1907) 207 U. S. 251, 52 L. ed. 195, 28 Sup. Ct. Rep. 89; *Heath & M. Mfg. Co. v. Worst* (1907) 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. Rep. 114."

⁸ With regard to this point the court made the following remarks: "A married man is bound by law to support his wife. If he is a wage earner, although she has no legal title to his wages, she has an interest in the right use of them. If there are such risks of his making an improper disposition of them by assigning them to secure the payment of money that he borrows for unnecessary purposes as to justify the legislature in limiting and regulating his exercise of this right, might they not regulate

it by requiring the consent of his wife as a prerequisite to the validity of his assignment? A strong argument can be made in favor of the plaintiff's contention on this point. But, on the whole, we are of opinion that the legislature might look chiefly to the ordinary relations between husband and wife under the law, and adopt this form of regulation as salutary in its application to most members of the class with which they were dealing. . . . It is contended that these sections are unconstitutional because of the provision of § 6 that renders the act inapplicable to certain banks, banking institutions, and loan companies. The argument is that this makes a discrimination without reason, and thus deprives others of the 'equal protection of the laws,' secured by the 14th Amendment of the Constitution of the United States. This would be so if no reason could be discovered by the legislature for making the discrimination. But seemingly the legislature might decide that the dangers which the statute was intended to prevent would not exist in any considerable degree from the business of national banks, or other banking institutions under the supervision of the bank commissioner, or from that conducted by a loan company established by a special charter and placed under the supervision of this commissioner. The legislature may be supposed to have known the kind of business done and likely to be done by these corporations, and they may have believed rightly that the business done by them would not need regulation in the interest of employees or employers. This was held by the supreme court of Delaware in an elaborate opinion in a similar case. *State v. Wickenhoefer* (1906) 6 Penn. (Del.) 120, 64 Atl. 273."

the manner of the execution and authentication of legal instruments. The laws of the states exhibit in their diversities the power of the legislature over property, its devolution and transfer. It is rather late in the day to question that power."

2828. Enactments allowing employees attorneys' fees in actions for the recovery of wages.—The decisions with regard to the validity of enactments which provide that servants who are successful in actions for the foreclosure of liens or the enforcement of other claims having relation to the recovery of their remuneration shall be entitled to a certain sum, or a reasonable amount for the payment of attorneys' fees, are singularly conflicting.

By several of the state courts such enactments have been sustained against the objections that they violate the equality clauses of the Federal and state Constitutions,¹ and that they deprive employers of

¹ *Dell v. Marvin* (1899) 41 Fla. 221, 45 L.R.A. 201, 79 Am. St. Rep. 171, 26 So. 188; *Thompson v. Wise Boy Min. & Mill. Co.* (1903) 9 Idaho, 363, 74 Pac. 958; *Duckwall v. Jones* (1900) 156 Ind. 682, 58 N. E. 1055, 60 N. E. 797; *Seelyville Coal & Min. Co. v. McGlosson* (1906) 166 Ind. 561, 117 Am. St. Rep. 396, 77 N. E. 1044, 9 Ann. Cas. 234; *Macbeth-Evans Glass Co. v. Amama* (1911) — Ind. —, 95 N. E. 228; *Macbeth-Evans Glass Co. v. Jones* (1911) — Ind. —, 95 N. E. 567; *Wortman v. Kleinschmidt* (1892) 12 Mont. 316, 30 Pac. 280; *Helena Steam-Heating & S. Co. v. Wells* (1895) 16 Mont. 65, 40 Pac. 78; *Singer Mfg. Co. v. Fleming* (1894) 39 Neb. 679, 23 L.R.A. 210, 42 Am. St. Rep. 613, 58 N. W. 226; *Genest v. Las Vegas Masonic Bldg. Asso.* (1902) 11 N. M. 251, 67 Pac. 743; *Title Guarantee Co. v. Wrenn* (1899) 35 Or. 62, 76 Am. St. Rep. 454, 56 Pac. 271; *Ivall v. Willis* (1897) 17 Wash. 645, 50 Pac. 467.

In *Vogel v. Pekoc* (1895) 157 Ill. 339, 30 L.R.A. 491, 42 N. E. 386, the court, in upholding the validity of the statute under review, used the following language: "The statute here in question interferes with no one's right to contract. It embraces a well-defined class of cases and persons, not singled out, as is contended, wholly without reason, and arbitrarily, but upon grounds which may, we think, properly serve as a basis for valid legislative action. Those to whom the wages of labor are due, and who, after demand, in writing, of a sum no

greater than that subsequently recovered, are compelled to establish and do establish their rights, as demanded, by judgment of court, are within the provisions of the act; and we cannot say this classification is so arbitrary and unreasonable, and the law so partial and unequal, as to be beyond legislative discretion and power." This decision was followed in *Massie v. Cessna* (1909) 239 Ill. 352, 360, 28 L.R.A. (N.S.) 1108, 130 Am. St. Rep. 234, 88 N. E. 152.

In *Seelyville Coal & Min. Co. v. McGlosson* (1906) 166 Ind. 561, 117 Am. St. Rep. 396, 77 N. E. 1044, 9 Ann. Cas. 234, the court said: "Appellant specially assails the validity of § 4 of the act in question, for the reason that it provides for a penalty, or, in other words, for the recovery of exemplary damages and a reasonable attorneys' fee in a civil action instituted by the employee to recover his wages which are due and unpaid. It is contended that the legislature has no power to authorize an assessment of a penalty and attorneys' fees in cases of this character. In *Republic Iron & Steel Co. v. State* (1903) 160 Ind. 379, 62 L.R.A. 136, 66 N. E. 1005, this power on the part of the legislature was expressly recognized. The court in that case said: 'No act of the legislature can be made effective without some reasonable provision for its enforcement, and the assessment of a penalty for noncompliance has long been recognized by the general assembly and the courts of this state

their property without due process of law.² In some of the cases in which their validity has been affirmed, reliance has been placed upon the conception that the attorneys' fee provided for is in no sense a penalty, but is allowed on the same principle as costs are allowed, *viz.*, for the purpose of indemnifying the plaintiff in respect of expenses necessarily incurred in enforcing his rights.³

as an efficient and reasonable means of securing obedience.' It will be seen that under the provisions of § 4, the employer who, on a demand upon the part of the employee, has for ten days thereafter failed to pay the wages due such employee, is declared to be liable in a civil action to the employee for the amount of wages due him, together with \$1 for each day succeeding the expiration of the ten-day limit, and for a reasonable attorneys' fee. The amount of damages allowed to be assessed, however, can in no event exceed double the amount of the wages due the employee. The statute in this respect is reasonable, and the amount of the exemplary damages assessed can neither be said to be excessive nor oppressive. It is manifest that if the delay in paying after the expiration of the ten days allowed is short, then, consequently, the damages to be assessed will be small. The employer is in a position to prevent the assessment of those damages by either paying or tendering the amount actually due the employee before the expiration of the prescribed limit. The essential purpose of the legislature, under the circumstances, in providing for the assessment of these damages, was to enforce the performance of the duty enjoined upon the employer to pay his employee the amount of his earnings or wages within ten days after demand is made for the payment thereof. According to the statute the additional amount of damages authorized to be assessed over and above the actual amount of wages due is regulated, or measured, at the rate of \$1 for each day which the employer allows his default in payment to continue beyond the prescribed limit." This case was followed in *Macbeth-Evans Glass Co. v. Jones* (1911) — Ind. —, 95 N. E. 567.

In *Cascaden v. Wimbish* (1908) 88 C. C. A. 277, 161 Fed. 241, the court, in sustaining the validity of § 270 of the Alaska Code, authorizing the allowance of a reasonable attorneys' fee in suits

for the foreclosure of a laborer's lien, said: "Statutes have been sustained giving special protection to the claims of laborers and mechanics, but no such idea underlies this legislation. It does not aim to protect the laborer or the mechanic alone, for its benefits are conferred upon every individual in the state, rich or poor, high or low, who has a claim of the character described. It is not a statute for the protection of particular classes of individuals supposed to need protection, but for the punishment of certain corporations on account of their delinquency." With reference to the contention of counsel, that the given provision was in conflict with the 14th Amendment, it was pointed out that this had no relevancy to the case, because its prohibitions are addressed to the states only.

For cases in which the validity of provisions allowing fees in actions other than those brought for the recovery of remuneration for services was affirmed, see *Peoria, D. & E. R. Co. v. Duggan* (1884) 109 Ill. 537, 50 Am. Rep. 619; *Kansas P. R. Co. v. Mower* (1876) 16 Kan. 573; *Perkins v. St. Louis, I. M. & S. R. Co.* (1890) 103 Mo. 52, 11 L.R.A. 426, 15 S. W. 320; *Burlington, C. R. & N. R. Co. v. Dey* (1891) 82 Iowa, 312, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98 (action for breach of statute as to rates of carriage on railways).

² *Duckwall v. Jones* (1901) 156 Ind. 683, 58 N. E. 1055, 60 N. E. 797; *Wortman v. Kleinschmidt* (1892) 12 Mont. 316, 30 Pac. 280.

³ *Singer Mfg. Co. v. Fleming* (1894) 39 Neb. 679, 23 L.R.A. 210, 42 Am. St. Rep. 613, 58 N. W. 226 (action brought under a statute prohibiting the assignment of a claim against any "laborer, servant, clerk, or employee," for the purpose of avoiding the effect of the exemption statute); *Ivall v. Willis* (1897) 17 Wash. 645, 50 Pac. 467 (suit for the foreclosure of a lien); *Title Guarantee*

In the opinion of other state courts, enactments of this tenor are unconstitutional, as being improperly discriminative between employees and employed.⁴

Co. v. Wrenn (1899) 35 Or. 62, 76 Am. St. Rep. 454, 56 Pac. 271 (foreclosure of lien).

⁴ *Randolph v. Builders' & Painters' Supply Co.* (1894) 106 Ala. 501, 17 So. 721; *Johnson v. Goodyear Min. Co.* (1899) 127 Cal. 4, 47 L.R.A. 338, 78 Am. St. Rep. 17, 59 Pac. 504 (action for wages); *Builders Supply Depot v. O'Connor* (1907) 150 Cal. 265, 17 L.R.A. (N.S.) 909, 119 Am. St. Rep. 193, 88 Pac. 982, 11 Ann. Cas. 712 (provision in lien law, held invalid, as denying the equal protection of the laws, and also as being repugnant to the clauses of the state Constitution which provide that general laws shall be uniform, prohibit special laws, and declare the inalienable rights of all men in respect of acquiring, possessing, and protecting property); *Davidson v. Jennings* (1900) 27 Colo. 187, 48 L.R.A. 340, 83 Am. St. Rep. 49, 60 Pac. 354 (inequality of remedy given by lien law was affirmed with reference to a clause in the Bill of Rights which declares that courts of justice shall be open to every person, and a speedy remedy afforded for every injury); *Los Angeles Gold Mine Co. v. Campbell* (1899) 13 Colo. App. 1, 56 Pac. 246 (foreclosure of lien); *Grand Rapids Chair Co. v. Runnels* (1889) 77 Mich. 104, 43 N. W. 1006 (foreclosure of lien); *Chicago, R. I. & P. R. Co. v. Mashore* (1908) 21 Okla. 275, 96 Pac. 630, 17 Ann. Cas. 277 (action for wages); *Oligsohlager v. Stephenson* (1909) 24 Okla. 760, 104 Pac. 345 (action for wages); *Brubaker v. Bennett* (1899) 19 Utah, 401, 57 Pac. 170 (foreclosure of lien).

In *Atkinson v. Woodmanse* (1903) 68 Kan. 71, 64 L.R.A. 325, 74 Pac. 640, the court said with reference to a provision in a mechanics' lien law: "The statute in question singles out property owners who are charged with receiving from artisans or day laborers labor going to the improvement of their property, by virtue of contract made by themselves or through contractors employed by them, and mullets them in damages if they should be unsuccessful in resisting a claimed lien therefor. Under the statute such persons are subjected to a lia-

bility for attorneys' fees, when owners of other classes of property, and when other classes of persons employing artisans and day laborers are not subjected to such burden, and their contracts for labor are segregated from all other contracts and separately classified as if they possessed some distinctive attribute calling for the imposition of special legislative penalties for their enforcement. Of course, the legislature may classify objects of legislation, . . . but the homely and highly beneficial act of building or repairing some structure upon his premises, or otherwise improving them, by any man, whether rich or poor, who possesses property whether much or little, does not so stand out from his other ordinary and innocent employments, or so stand out from similar employments of other men, as naturally to distinguish it from them. There is absolutely nothing to indicate that such a person, or a contract for such a purpose, should be the subject of impositions not suffered by others. The duty to pay is not more vital to the welfare of the public in this case than it is between other persons and with respect to other obligations. The legislature could not have believed that claims of the character adverted to by this act were unconscionably resisted beyond all other debts, and no other legal reason is discoverable for such a hostile and discriminating law."

In *Hocking Valley Coal Co. v. Rosser* (1895) 53 Ohio St. 12, 29 L.R.A. 386, 53 Am. St. Rep. 622, 41 N. E. 263, the validity of an enactment providing that, "if the plaintiff in any action for wages recover the sum claimed by him in his bill of particulars, there shall be included in his costs such fee as the court may allow, but not in excess of \$5, for his attorney," was thus discussed: "Under the statute, to entitle the plaintiff to have an attorney fee taxed against the defendant, he is not required to show that the debtor had funds, which he wilfully or arbitrarily or even carelessly refused to apply to pay his debts, nor that a vexatious or dilatory defense had been made to defeat or delay the judgment. No

The Federal Supreme Court (three justices dissenting) has indorsed the latter of these doctrines to the extent of declaring that a statute allowing attorney's fees to parties who establish against railway companies, claims of certain specified descriptions, including

other misconduct by the defendant is required than such as may be implied from a failure to comply with the peremptory written demand made upon him. Whether the debtor interposes a vexatious defense, whether he makes an honest though unsuccessful one, or whether he makes none at all, but instead suffers judgment to be taken against him by default, are all equally immaterial; in either case the statute denounces against him a penalty called an attorney fee, if an action is brought on the claim and judgment recovered for the sum demanded. The debtor may even acknowledge the debt and be solicitous for its payment, but, owing to straightened circumstances, fails to pay within the prescribed time, nevertheless the penalty is incurred. . . .

Upon what principle can a rule of law rest which permits one party, or class of people, to invoke the action of our tribunals of justice at will, while the other party, or another class of citizens, does so at the peril of being mulct in an attorney fee, if an honest, but unsuccessful, defense should be imposed? A statute that imposes this restriction upon one citizen, or class of citizens, only, denies to him or them the equal protection of the law. It is true that no provision of the Constitution of 1851 declares, in direct and express terms, that this may not be done; but, nevertheless, it violates the fundamental principles upon which our government rests, as they are enunciated and declared by that instrument in the Bill of Rights. The first section of the Constitution declares that the right to acquire, possess, and protect property is alienable, and the next section declares, among other things, that 'government is instituted for their equal protection and benefit' of every person, while § 16 of article 1 provides that 'all courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and justice shall be administered without denial or delay.' The right to protect property is declared, as well as that justice shall

not be denied, and that everyone is entitled to equal protection. Judicial tribunals are provided for the equal protection of every suitor. The right to retain property already in possession is as sacred as the right to recover it when dispossessed. The right to defend against an action to recover money is as necessary as the right to defend one brought to recover specific real or personal property. An adverse result in either case deprives the defeated party of property: If the general assembly has power to enact the statute in question, it could also enact one providing that lawyers, doctors, grocers, or any other class of citizen might make out their accounts, demand in writing their payment within a short time, which, if not complied with, would entitle the plaintiff to an attorneys' fee in addition to his claim if he recover the amount demanded. We do not think the general assembly has power to discriminate between persons or classes, respecting the right to invoke the arbitrament of the courts in the adjustment of their respective rights."

The two California cases above cited overrule the following in so far as they proceed upon the assumption that the provisions in question are valid. *Rapp v. Spring Valley Gold Co.* (1888) 74 Cal. 532, 16 Pac. 325; *McIntyre v. Trautner* (1883) 63 Cal. 429; *Jewell v. McKay* (1889) 82 Cal. 144, 23 Pac. 139; *Harlan v. Shufflebeen* (1891) 87 Cal. 508, 25 Pac. 686.

For cases in which provisions allowing attorneys' fees to successful litigants in actions against railroad companies for killing cattle have been pronounced invalid, see *South & North Ala. R. Co. v. Morris* (1880) 65 Ala. 193; *Wilder v. Chicago & W. M. R. Co.* (1888) 70 Mich. 383, 38 N. W. 289; *Lafferty v. Chicago & W. M. R. Co.* (1888) 71 Mich. 35, 38 N. W. 660; *Jnolliffe v. Brown* (1896) 14 Wash. 155, 53 Am. St. Rep. 868, 44 Pac. 149. But this decision is inconsistent with the later one rendered in *Ivall v. Willis*, note 1, *supra*.

those for services, is unconstitutional.⁵ Such a decision would not be absolutely inconsistent with the cases in which the former doctrine has been applied, if it had been founded *solely* upon the conception that the statute in question was improper class legislation in respect of its

⁵ *Gulf, C. & S. F. R. Co. v. Ellis* (1897) 165 U. S. 156, 41 L. ed. 668, 17 Sup. Ct. Rep. 255, reversing (1894) 87 Tex. 19, 26 S. W. 985. The statute under review was the Texas act of April 5, 1889, which provides that "any person . . . having a valid bona fide claim for personal services rendered or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railway company," to an amount not exceeding \$50, may, if his claim is not paid within thirty days after presentation to an agent of the company in the manner prescribed, "immediately institute suit thereon in the proper court; and if he shall finally establish his claim, and obtain judgment for the full amount thereof, . . . he shall be entitled to recover the amount of such claim and all costs of suit, and in addition thereto all reasonable attorneys' fees . . . not to exceed \$10." It was held that this enactment operated to deprive the railway companies of property without due process of law, and denied to them the equal protection of the law, in that it singled them out of all citizens and corporations, and required them to pay in certain cases attorneys' fees to the parties successfully suing them, while it gave to them no like or corresponding benefit. The court said: "It is, of course, proper that every debtor should pay his debts, and there might be no impropriety in giving to every successful suitor attorneys' fees. Such a provision would bear a reasonable relation to the delinquency of the debtor, and would certainly create no inequality of right or protection. But before a distinction can be made between debtors, and one be punished for a failure to pay his debts, while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other. If it be said that this penalty is cast only upon corporations, that to them special privileges are granted, and

therefore upon them special burdens may be imposed, it is a sufficient answer to say that the penalty is not imposed upon all corporations. The burden does not go with the privilege. Only railroads, of all corporations, are selected to bear this penalty. The rule of equality is ignored. It may be said that certain corporations are chartered for charitable, educational, or religious purposes; and abundant reason for not visiting them with a penalty for the nonpayment of debts is found in the fact that their chartered privileges are not given for pecuniary profit. But the penalty is not imposed upon all business corporations, all chartered for the purpose of private gain. The banking corporations, the manufacturing corporations, and others like them, are exempt. Further, the penalty is imposed not upon all corporations charged with the quasi public duty of transportation, but only upon those charged with a particular form of that duty. So, the classification is not based on any idea of special privileges by way of incorporation, nor of special privileges given thereby for purposes of private gain, nor even of such privileges granted for the discharge of one general class of public duties. But if the classification is not based upon the idea of special privileges, can it be sustained upon the basis of the business in which the corporations to be punished are engaged? That such corporations may be classified for some purposes is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature; and the legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. Fencing of railroad tracks, use of safety couplers, and a multitude of other things easily suggest themselves. And any classification for the imposition of such special duties—duties arising out of the peculiar business in which they are engaged—is a just classification, and not one within the prohibition of the 14th Amendment." After adverting to the nature of the claim under dis-

being applicable to railway companies alone. But from the extracts quoted in the footnotes from the opinion it is impossible to draw any other inference than that the court intended to rely also upon the broad theory that such an enactment was not within the scope of the police power at all.⁶ Consequently, the view that statutes of the description specified at the commencement of the section are valid cannot any longer be maintained without disregarding the authority of the Federal Supreme Court.⁷

cussion as being one for stock killed, and to the cases in which the validity of statutes imposing double damages for injuries resulting from the failure of railway companies to fence their tracks has been affirmed, the court continued thus: "There is no fence law in Texas. The legislature of the state has not deemed it necessary for the protection of life or property to require railroads to fence their tracks; and as no duty is imposed, there can be no penalty for nonperformance. Indeed, the statute does not proceed upon any such theory; it is broader in its scope. Its object is to compel the payment of the several classes of debts named, and was so regarded by the supreme court of the state. But a mere statute to compel the payment of indebtedness does not come within the scope of police regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts. That is a duty resting upon all debtors; and while in certain cases, there may be a peculiar obligation which may be enforced by penalties, yet nothing of that kind springs from the mere work of railroad transportation. Statutes have been sustained giving special protection to the claims of laborers and mechanics, but no such idea underlies this legislation. It does not aim to protect the laborer or the mechanic alone, for its benefits are conferred upon every individual in the state, rich or poor high or low, who has a claim of the character described. It is not a statute for the protection of particular classes of individuals supposed to need protection, but for the punishment of certain corporations on account of their delinquency. Neither can it be sustained as a proper means of enforcing the payment of small debts and preventing any unnecessary litigation in respect to them, because it does not impose the

penalty in all cases where the amount in controversy is within the limit named in the statute. Indeed, the statute arbitrarily singles out one class of debtors and punishes it for a failure to perform certain duties,—duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection of the laboring classes, or to prevent litigation about trifling matters, or in consequence of any special corporation privileges bestowed by the state. Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency, this statute cannot be sustained."

⁶ This doctrine was again affirmed in the following year: "Compelling the payment of debts is not a police regulation." *Atchison, T. & S. F. R. Co. v. Matthews* (1898) 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609. In that case the validity of an enactment allowing attorneys' fees in actions brought to recover damages for injury caused by the operation of a railroad was affirmed on the theory that "the purpose of the statute is not to compel the payment of debts, but to secure the utmost care on the part of railroad companies to prevent the escape of fire from their moving trains." But four justices dissented, Harlan, J., delivering for them a characteristically vigorous opinion in which he demonstrated the extreme tenuous character of the distinction relied upon by the majority of the court as a ground for not treating the earlier decision as a controlling precedent.

⁷ It is submitted that the opinion expressed in two cases in which such statutes were upheld, that the rulings to this effect were not inconsistent with

B. ENACTMENTS LIMITING THE HOURS OF LABOR.

The enactments relating to women and minors are discussed in §§ 2836, 2839, *post*.

2829. Enactments relating to public work.—The conflict between decisions under this head is mainly the result of a fundamental divergence of views regarding the question whether legislative power in respect of an existing municipality is confined to the regulation of its governmental functions, or extends to all the branches of its administration, including those which are concerned with the exercise of its proprietary rights.

Since the more comprehensive theory as to the scope of that power has been adopted by the Federal Supreme Court (see subsec. *b*, *infra*), it must be regarded as embodying a settled rule of law, so far as the state courts are concerned.

But the New York court of appeals has declined to accept all the conclusions to which the theory seems to lead. See subsec. *e*, *infra*.

a. Colorado.—It has been held that the statute by which it is declared to be a criminal offense for any officer or agent of the state, or a municipality or any contractor thereof, to employ any mechanic, workingman, or laborer for more than eight hours a day, is not sustainable as an exercise of the police power, but that its validity may be predicated "upon the ground that the state, in its proprietary capacity, may properly prescribe for itself and its auxiliary arms of government the terms and conditions on which work of a public nature may be done."¹

b. Kansas.—By the Supreme Court of the United States a Kansas statute which provides that eight hours shall constitute a day's work for all persons employed by or on behalf of the state, or by or on behalf of any municipality, has been pronounced valid "upon the broad ground that the work being of a public character, absolutely under the control of the state and its municipal agents, acting by its authority, it is for the state to prescribe the conditions under which it will permit work of that kind to be done. Its action touching such a matter is final so long as it does not, by its regulations, infringe the personal rights of others; and that has not been done."²

anything said or determined by the Supreme Court, was erroneous. See *Dell v. Marvin* (1899) 41 Fla. 221, 45 L.R.A. 201, 79 Am. St. Rep. 171, 26 So. 188; *Thompson v. Wise Boy Min. & Mill Co.* (1903) 9 Idaho, 363, 74 Pac. 958.

¹ *Keefe v. People* (1906) 37 Colo. 317, 8 L.R.A. (N.S.) 134, 87 Pac. 791, following the *Atkin Case*, note 2, *infra*.

² *Atkin v. Kansas* (1903) 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124, affirming (1902) 64 Kan. 174, 97 Am. St. Rep. 343, 67 Pac. 519. "If," said the court, "the work upon which

The argument that a statute of this type is mischievous in its tendencies was met by the answer that "the responsibility therefor rests upon legislatures, not upon the courts."³

As the work involved in the case was done under an independent contract, the decision impliedly involved a disapproval of the doctrine of the New York court of appeals, that an enactment of this type is valid in respect of work performed by the immediate employees of a

the defendant employed Reese was of a public character, it necessarily follows that the statute in question, in its application to those undertaking work for or on behalf of a municipal corporation of the state, does not infringe the personal liberty of anyone. It may be that the state, in enacting the statute, intended to give its sanction to the view held by many, that, all things considered, the general welfare of employees, mechanics, and workmen, upon whom rest a portion of the burdens of government, will be subserved if labor performed for eight continuous hours was taken to be a full day's work; that the restriction of a day's work to that number of hours would promote morality, improve the physical and intellectual condition of laborers and workmen, and enable them the better to discharge the duties appertaining to citizenship. We have no occasion here to consider these questions, or to determine upon which side is the sounder reason; for, whatever may have been the motives controlling the enactment of the statute in question, we can imagine no possible ground to dispute the power of the state to declare that no one undertaking work for it or for one of its municipal agencies should permit or require an employee on such work to labor in excess of eight hours each day, and to inflict punishment upon those who are embraced by such regulations, and yet disregard them. It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on

this subject suggest only considerations of public policy. And with such considerations the courts have no concern."

To the contention that it is "the right of everyone to dispose of his labor upon such terms as he deems best,—as undoubtedly it is,—and that to make it a criminal offense for a contractor for public work to permit or require his employee to perform labor upon that work in excess of eight hours each day is in derogation of the liberty both of employees and employer," it was deemed to be a sufficient reply, that "no employee is entitled, of absolute right and as a part of his liberty, to perform labor for the state; and no contractor for public work can excuse a violation of his agreement with the state by doing that which the statute under which he proceeds distinctly and lawfully forbids him to do."

³ It was observed that "no evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true—indeed, the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution. It cannot be affirmed of the statute of Kansas that it is plainly inconsistent with that instrument; indeed, its constitutionality is beyond all question."

municipality, but not in respect of work performed through the agency of an independent contractor. See subsec. *e*, *infra*. The Federal Supreme Court has, in effect, adopted the principle laid down in a Kansas case, which was relied upon as a controlling authority in the one which its judgment affirmed, *viz.*, that such an enactment is essentially a direction of the state to its agents, and therefore not in conflict with constitutional provisions which protect the right of citizens to make contracts.⁴

c. Massachusetts.—In answer to questions submitted to it by the legislature, the supreme court has laid it down that the hours of laborers on public works may be limited by statute to eight hours.⁵

⁴In *Re Dalton* (1899) 61 Kan. 257, 47 L.R.A. 380, 59 Pac. 336, the court said: "We see in this law no infringement of constitutional rights. There can be no compulsion of a contractor to bid on public work, nor is the laborer bound to take employment from a person having such contract. If the terms relating to the hours of labor do not suit either the contractor or the employee, there is no compulsion on either the one or the other to take the contract or to perform any labor for the state. The terms of employment are by this statute publicly proclaimed, and if a person insists upon working more than eight hours a day, he must seek other employment. His liberty of choice is not interfered with, nor his right to labor infringed."

In *Re Ashby*, 60 Kan. 101, 55 Pac. 336, the same statute had been previously held to preclude a municipality from passing an ordinance requiring persons to labor on two days for ten hours, for the purpose of working out their poll tax.

⁵In *Re Opinion of Justices* (1911) 208 Mass. 619, 34 L.R.A. (N.S.) 771, 94 N. E. 1044, the opinion contains the following remarks: "The question before us relates only to employment upon public works by the commonwealth, the counties, and such cities and towns as have accepted the provisions of two earlier acts. These are divisions of government, established in the public interest. The legislature is supreme in the control of these instrumentalities of government, subject only to the provisions of the Constitution. It may direct, by proper enactment, the method in which any one of these divisions of

government shall conduct its public business. It may enlarge or limit the kinds of contracts that either of these divisions may make. It may compel the conduct of the public business in a way that does not promote the prosperity of individuals. Even though it may be considered an interference with individual rights and a detriment to the best interests of the community, which depend largely upon the success of individuals, it may determine that in the construction of their public works the several divisions of government shall make no contracts except of particular kinds. It may determine that in such construction no work shall be done except by persons who are willing to submit to contractual limitations which it could not impose upon men generally in their dealings with one another in their private affairs. A person desiring to perform or furnish labor upon a public work must submit to such terms as the proprietor may impose as a condition of his employment. The legislature representing and controlling these several divisions of government stands in the place of a proprietor. Because the business to be done is that of one of these divisions of government, persons can engage in doing it only in accordance with the requirements of the controlling authority. We answer this branch of the question in the affirmative, not because we think that such regulations in regard to the hours of labor for men in common employment would be wise or constitutional, but because it is in the power of the proprietor of a business to prescribe the methods in accordance with which it shall be conducted."

But the section in the proposed act which provided that working more than eight hours in any one day shall be *prima facie* evidence of the violation of the statute was held to be invalid, because the fact alleged to constitute a *prima facie* case has no tendency to establish guilt.

In *Re Opinion of Justices, supra*, the court observed that "to provide that such a fact shall constitute *prima facie* evidence that warrants a finding of guilty beyond a reasonable doubt would be contrary to fundamental principles of criminal law."

d. Montana.—The statute by which it is declared that "eight hours shall constitute a day's work" on all public works has been pronounced valid.⁶

e. New York.—In the earliest of the relevant cases, the supreme court affirmed the constitutionality of a provision in a city charter, to the effect that no man or set of men should be employed for more than eight hours a day, except in case of necessity, by a contractor doing work for the city.⁷

This doctrine was adhered to on a second appeal to this tribunal.⁸

⁶ *State v. Livingston Concrete Bldg. & Mfg. Co.* (1906) 34 Mont. 570, 87 Pac. 980, 9 Ann. Cas. 204 (Laws 1903, chap. 50, § 1).

⁷ See *People v. Warren* (1894) 77 Hun, 120, 59 N. Y. S. R. 857, 28 N. Y. Supp. 303. The following passages in the opinion are worth quoting as a contribution to the law of the subject, although the doctrine which they embody is not in harmony with the cases cited in the following note:

"The only right, privilege, or immunity of any citizen of the United States, which, it is charged, may be abridged,—or of which, it is charged, any member of this state may be deprived by the operation of the statute in question,—is what has been called, in language quoted by counsel, 'the sacred right of labor,' by which we understand to be intended the right of every man to do such lawful work as he finds employment to do, on such terms as he can agree upon with his employer. We do not understand that there is any right of labor which goes beyond that. No man has a right to labor for me unless I employ him, and in fixing the terms of the employment my right is as good as his. He can no more compel me to his terms than I can compel him to

mine. If my terms do not suit him, he may seek employment elsewhere; if his terms do not suit me, I may employ another man. Thus the liberty of both is respected, and no right of either is infringed. Of course, the terms of employment include the hours of labor. I may hire a man to work for me by day or by night, and for one hour or twelve of the twenty-four. And so might the city of Buffalo, except that, in respect to one class of work, *viz.*, that done under contract, it chose to have a provision inserted in its organic law to the effect that such work should be done for it by day's work of eight hours each, and that all its contracts should so provide. By means of the statute in question, therefore, the terms of employment of laborers on contract work for the city of Buffalo are fixed, on the part of the city, and it remains for the laborer seeking employment to accept or refuse those terms. If he insists upon working more than eight hours a day, he may seek other employment, either for the whole or for the excess of his time. His liberty of choice is not interfered with, nor his right to labor infringed."

⁸ (1894) 62 N. Y. S. R. 396, 30 N. Y. Supp. 473.

Its decision as a whole was reversed by the court of appeals,⁹ but no definite opinion was expressed regarding the constitutionality of the provision under which the defendant had been prosecuted, his conviction being quashed on the ground that the section of the charter was not a penal one.

By the labor law of 1897, and the amendments added in 1899, it was declared that eight hours should constitute a legal day's work for all classes of employees, inclusive of those in the service of independent contractors, performing work for municipal corporations. This provision was held to be invalid under the state Constitution, as it then stood, "first, because it required the expenditure of money of the city, or that of the local property owners, for other than city purposes; second, because it invaded rights of liberty and property, in that it denied to the city and the contractor the right to agree with their employees upon the measure of their compensation."¹⁰

⁹ (1894) 144 N. Y. 225, 39 N. E. 80.

¹⁰ Statement of the court in *People ex rel. Williams Engineering & Contracting Co. v. Metz* (1908) 193 N. Y. 148, 24 L.R.A.(N.S.) 201, 85 N. E. 1070, referring to *People ex rel. Rodgers v. Coler* (1901) 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716, and *People ex rel. Treat v. Coler* (1906) 166 N. Y. 144, 59 N. E. 776. See § 2822, note 7, ante.

In *People ex rel. Cossey v. Grout* (1904) 179 N. Y. 417, 72 N. E. 464, 1 Ann. Cas. 39, reversing (1902) 96 App. Div. 607, 89 N. Y. Supp. 1113, where the validity of the provision was discussed with reference to that part of it which limited the hours of labor, the court, after having stated the effect and rationale of *Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124 (see note 2, supra), continued thus: "This case doubtless disposes of all claim that labor legislation of the kind now before us is in contravention of the Constitution of the United States, but it does not necessarily impair the authority of the decision in the *Rodgers Case* [*People v. Coler*], though it does affect part of the reasoning by which the conclusion in that case was reached. The prevailing opinion in the *Rodgers Case* proceeded on two grounds: 1, that the labor law invaded the constitutional rights of the municipality; 2, that it invaded the constitutional rights of the

contractor by depriving him of his liberty to contract with his employees, and in confiscating the stipulated price for his work in case he failed to comply with its provisions. The second ground, the supposed invasion of the rights of the contractor, is entirely swept away by the decision in the *Atkin Case*, because, as pointed out by the Supreme Court of the United States, no man has any right to contract with the public, any more than with an individual, except on such terms and conditions as the state chooses to prescribe; and so far as any confiscation of his property, the contract price, is concerned, he never acquires any right to such payment except on the performance of the terms of his contract. The first ground of the decision in the *Rodgers Case*, that the labor law was an unconstitutional violation of the city's rights and powers, is not, however, determined by the *Atkin Case*. Though a municipality has no rights as against the state, protected by the Federal Constitution, its relation to the state government and the extent of the power of the legislature to control it are to be determined exclusively by the provisions of the state Constitution, which may bestow upon a municipality such degree of autonomy as the people see fit. Hence, so far as the decision in the *Rodgers Case* rests upon this ground, it is in no way impaired by the *Atkin Case*." This theory concerning

the scope of the decision in the *Atkin Case* will probably not meet with universal acceptance. It is true that the Federal court did not make any express ruling with respect to the question whether the enactment under review was an unwarrantable invasion of the rights and powers of the given city; but the conclusion that this question should be answered in the negative is so plainly indicated by its reasoning that there seems to be virtually no doubt what its decision would have been, if the point had been explicitly raised. The present writer ventures to express the opinion that the *Atkin Case* has in effect wholly destroyed the authority of the *Rodgers Case*. In the *Grout Case*, O'Brien, J., delivered a lengthy opinion, concurring in the actual decision, but dissenting from the statement made in the opinion delivered for the court, that the *Atkin Case* had entirely swept away the second of the grounds upon which the *Rodgers Case* rests. The learned judge argued thus: "The court had before it for construction a statute widely different from our own, since the only remedy prescribed for its enforcement was by indictment and criminal prosecution. It was a criminal case, based upon a criminal statute, that obviously contained no such drastic remedies for enforcement as are to be found in the statute now before us. It did not assume, as our statute does, to destroy or confiscate the contractor's property, or to annul his contract, or to deprive him of any remedy for the collection of the fruits of his contract. It did not touch the contract at any point, nor the money earned upon it. It simply subjected his person to incarceration for violation of the law, and after conviction, all his remedies against the city for collecting the price of his work were left intact. He could enforce his claim against the city for the money earned on the contract just as well after conviction as he could before. The wide difference between the Kansas statute and our own will thus be seen at a glance. The former simply punishes the contractor for a specific act or omission, while the latter deprives him of all property

rights under his contract which, with us, frequently amounts to thousands and even millions of dollars. The *Kansas Case* decides nothing except the single proposition that the defendant in the case, having voluntarily entered into the contract, was not deprived of his personal liberty by the statute. That was the sole question before the court, and the decision does not conflict in the least with anything decided in the *Rodgers Case*, except possibly what was there said with respect to the personal liberty of the contractor, so far as that was supposed to be involved in the right to make contracts with his workmen. There is not a word in the opinion of the court, as I now recall it, with respect to the effect of the statute upon the property rights of the contractor, and for the plain reason that the statute did not assume to disturb or interfere with these rights at all. . . . The fallacy of the argument that gives such effect to the Kansas case consists in the assumption that because the court held that the Kansas statute does not interfere with personal liberty, it therefore held that our statute does not invade the rights of private property. There was no question in the case in regard to the deprivation of the contractor of his property. It is obvious that a case which deals only with the question of personal liberty cannot be an authority to overthrow our decision in the *Rodgers Case*, based, as it was, upon an entirely different statute which invades and was held by us to invade the constitutional safeguards of private property." The obvious flaw in this ingenious argument is that it ignores the consideration that every contractor who enters into a contract for public work under such a law as that of New York does so with a knowledge of the penalties affixed to a violation of its provisions. The validity of such a law is determinable with reference to the situation existing at the time when contracts are made. If it sustains this test satisfactorily, the loss of property which a contractor suffers as a result of having infringed it is not a sufficient reason for treating it as confiscatory.

The cognate provision in the Penal Code by which persons or corporations who contracted with the state or a municipal corporation were subjected to a penalty if they required more than eight hours for a day's labor has been declared unconstitutional.¹²

The *ratio decidendi* was that the enactment made an arbitrary distinction between persons contracting with the state and other employers of labor,¹³ and that it could not be sustained as an exercise of the police power, because it had no bearing upon the health or security of the class of persons affected. In answer to the argument of counsel that the work in question was a state work, and that the legislature might prescribe rules for the manner in which it was to be performed. The court observed that this doctrine was correct, so far as persons directly hired by the state were concerned, and that the state being not only master, but sovereign, might possibly enact that the violation of its mandates should constitute a criminal offense. But it was pointed out that the provision in question did not deal exclusively with such persons, as it was presumably intended to be applicable to the class of employees whose legal appellation is "independent contractors." Although, therefore, in cases where the state itself prosecutes a work, "it may dictate every detail of the service required in its performance,—prescribe the wages of workmen, their hours of labor, and the particular individuals who may be employed,—no such right exists where it has let out the performance of the work to the contractor, unless it is reserved by the contract. The state in this respect stands the same as its citizens. Its rights are just as

¹² *People v. Orange County Road Constr. Co.* (1903) 175 N. Y. 84, 65 L.R.A. 33, 67 N. E. 129, reversing (1902) 73 App. Div. 580, 77 N. Y. Supp. 16 (Penal Code, § 384h).

¹³ The court observed: "The defendant might be constructing in the next town a road for a turnpike company or for its own use. In this work it could require labor for as many hours a day as it saw fit and could get workmen to perform.

Yet the same action, involving the same character of work, when done in performance of a contract with the public, is by this statute made criminal. If we assume that a general statute forbidding in all cases the performance of physical labor for more than eight hours out of the twenty-four would be constitutional, that concession would not sustain the validity of the act before us."

great as those of private citizens, but no greater.”¹⁴ The court declined to make any definite statement regarding the power of the legislature to make the mere breach of a civil contract a criminal offense.¹⁵ It was observed that that question would have been presented, if the effect of the given statute had been that any person should be punishable who, having contracted with the state or a municipality not to require or suffer his employees or workmen to labor more than eight hours a day, should violate that agreement. But it was not raised by the enactment under review, which was so expressed as to make no distinction between contractors whose contracts had been made prior to its enactment and those who might contract subsequently. Its scope was broad enough to render it applicable to a contractor who should require more than eight hours’ work a day, though he was engaged in the performance of a contract entered into before it was enacted. It did not assume to punish an offender against its provisions because he has violated any contract, but solely because he had done the prohibited act; *i e.*, required more than eight hours’ labor, regardless of the terms and conditions of his contract. It must therefore be condemned in its entirety.¹⁶

After the above-mentioned provision in the labor law of 1897 had been declared invalid, the New York Constitution was amended by the addition of a clause to the effect that “the legislature may regulate and fix the wages or salaries, the hours of work or labor, and make provisions for the protection, welfare, and safety of persons employed by the state, or by any county, city, town, village, or other civil division of the state, or by any contractor or subcontractor performing work, labor, or services for the state, or for any county, city, town, village, or other civil division thereof.” The annulled statute was then re-enacted. It has been pronounced valid, so far as regards the clause which ordains that no workman employed by a contractor “shall be permitted or required to work more than eight hours in one calendar day.”¹⁷ It was laid down that the legislature, having con-

¹⁴ See p. 90 of opinion.

¹⁵ As to this point, see § 318, *ante*, and §§ 2832, 2833, *post*.

¹⁶ See pp. 92, 93, of the opinion delivered for the court. The concurrence of Bartlett, Martin, and Vann, JJ., in the judgment, was placed solely on the ground that the indictment was insufficient, because it failed to allege that the contract therein referred to was made subsequent to the enactment of the statute; but they considered that even the

expression of a doubt regarding the power of the state to enforce its constitutional mandate by making a violation thereof a crime was unwarrantable. In their opinion that power exists, whether the violation arises under a contract made with the state or otherwise.

¹⁷ *People ex rel. Williams Engineering & Contracting Co. v. Metz* (1908) 193 N. Y. 148, 24 L.R.A. (N.S.) 201, 85 N. E. 1070. The point actually determined was that the comptroller was jus-

stitutional power to regulate and fix the hours of labor on public work done by or for municipal corporations, had the incidental power to impose penalties for the violation of the statute by fine or by imprisonment or by both, or to provide for a forfeiture of the contract, or to prohibit payment for work done under it. The decision to this effect was referred to the considerations (1) that the Constitution, in its altered form, authorized the enactment of the provision under review; ¹⁸ (2) that the objection based upon the "discrimination between persons employed by private individuals and those employed by municipal corporations" was foreclosed by the decision of the Supreme Court of the United States in *Atkin v. Kansas*; ¹⁹ and (3) that the exemption of certain specified classes of employees from the operation of the enactment did not involve a denial of the equal protection of the laws. ²⁰

tified in refusing to issue warrants for the payment of the relators' claims in respect of work performed under conditions which involved an infraction of the statute.

This decision overrules *People ex rel. Hausauer-Jonas Printing Co. v. Zimmerman* (1908) 58 Misc. 264, 109 N. Y. Supp. 396, in which the invalidity of the enactment had been affirmed on the authority of *People ex rel. Rodgers v. Coler* (1901) 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716, reviewed in § 2822, note 7, *ante*.

¹⁸ The court, after referring to the cases cited in notes 10 and 11, *supra* (*People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; *People ex rel. Treat v. Coler*, 166 N. Y. 144, 59 N. E. 776; *People v. Orange County Road Constr. Co.* 175 N. Y. 84, 65 L.R.A. 33, 67 N. E. 129; *People ex rel. Cossey v. Grout*, 179 N. Y. 417, 72 N. E. 464, 1 Ann. Cas. 39) proceeded thus: "Those provisions of the Constitution which were violated by the labor law of 1897 were not violated by the labor law of 1906, so far as we are now treating it, because in the meantime the Constitution had been so amended as to modify said provisions by authorizing the legislature to regulate and fix the hours of labor upon public work. Unless the amendment did this, it did nothing, and the Constitution is the same in effect as it was before. The presumption is that the people, in exercising their supreme power, did not do a vain act, but effected a definite purpose. Freedom of

contract still exists, but not to the same extent as formerly, because the people have commanded that that right must yield so far as reasonably necessary to enable the legislature to fix and regulate the hours of labor on work done for the state or any civil division thereof. The same is true of the other provisions of the Constitution which were relied upon by us in passing on the labor law of 1897. Every provision of the Constitution as it was before it was amended, which so conflicts with the amendment that it cannot be fairly harmonized therewith, necessarily yields thereto, but only to the extent necessary to make the amendment reasonably effective. As the legislature has power to regulate and fix the hours of labor on public work, it has the incidental power to compel obedience to its commands by mild or severe penalties, as it sees fit. . . . Our conclusion upon this branch of the case is that, in view of the history of the amendment in question, and the causes which led to it, the legislature now has power and had, when the present labor law was enacted, to fix and regulate the hours of labor on public work by limiting them to eight hours in one calendar day, and to provide that when that limit is exceeded, no officer of state or municipal government shall be permitted to pay therefor from funds under his official control."

¹⁹ (1903) 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124. See note 2, *supra*.

²⁰ Under this head the court remarked: "We do not regard this classi-

f. Ohio.—An enactment declaring it to be unlawful to require or permit laborers, workmen, or mechanics to labor more than eight hours in one day, upon work done for the state or any political subdivision thereof, has been pronounced invalid.²¹

The court refused to adopt the theory that, in its essence, the enactment was not an attempt to interfere with the right of making contracts, but was in the nature of a direction by a principal to his agent, and consequently within the power of the legislature.²²

lication as arbitrary or capricious within the rule governing the subject, for it has some reason to support it, and, hence, was within the power of the legislature. Employees with duties to be discharged in the nighttime, or partly by day and partly by night, as in asylums, prisons, and the like, and those who operate the machinery for heating and lighting the state capitol when the legislature is in session, may properly receive separate classification in order to prevent public injury and inconvenience. Here, also, the state was dealing with its own agencies and had the right to promote its convenience and welfare by making a distinction between those who perform manual labor for the most part, and those who work largely with their brains. The one class of duties involves greater bodily fatigue than the other, and as positions in state institutions are regarded as higher in rank and less exacting, they are eagerly sought for as more desirable. The exemption of those employed in working upon highways outside the limits of cities and villages apparently applies only to employees of counties and towns, or of the state, or contractors therewith, as in building and repairing state roads and the like. This is in conformity with the custom in rural districts, where, as it may be argued, the crops could neither be planted nor gathered by laboring but eight hours a day. The reason for the distinction may not be conclusive, but it will support an argument, which is sufficient. Moreover, the employees in the exempt classes, as a rule, work away from home, under circumstances, conditions, and surroundings which differ from those affecting employees working near their homes in cities and villages. The law requires equality only among those similarly situated, and this rule, we think, was observed by the statute in question. We have just consid-

ered the subject of discrimination along the line of discussion adopted by counsel, but we regard it as of slight importance in this case, because in the legislation in question the state was dealing with its own creations, and could discriminate as it saw fit."

²¹ *Cleveland v. Clements Bros. Constr. Co.* (1902) 67 Ohio St. 197, 59 L.R.A. 775, 93 Am. St. Rep. 670, 65 N. E. 885 (act of April 16, 1900). The case of *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716 (§ 2822, note 7, *ante*), was cited with approval.

²² The argument in this connection was stated to be this: "That the several municipal governments of the state are not in themselves independent and sovereign, but are subdivisions of the general government, created by it with enumerated powers, and with no powers except such as may be fairly drawn from their charters or creation. Hence they contend that being mere subdivisions of the state, and deriving their powers from the state, such municipalities may be lawfully directed by the legislative will as to what contracts they may make and what provisions and stipulations their contracts shall contain; and that in the contract here in question, the city of Cleveland being a mere agency and instrument of the state, the state had the right, by and through its legislature, to direct and require the city, as its agent and representative, to insert in this contract the stipulations and provisions therein found." The court said: "The fallacy of this contention lies in the assumption that the compulsory authority of the legislature over municipal corporations is so absolute and arbitrary that it may dictate the specific terms upon which such municipality shall contract, and may prescribe what stipulations and conditions its contract shall contain,

A further reason assigned for holding the enactment to be invalid was, that it denied to persons contracting with the state the right to stipulate freely with regard to terms upon which the work should be done.²³

g. Oklahoma.—The eight hour labor law, which declares that eight hours shall constitute a day's work in all cases of employment by the state or any county or municipality, has been sustained against the objections that it deprives a contractor for public work of his property without due process of law, and that it denies him the equal protection of the laws.²⁴

h. Pennsylvania.—The distinction between the legal attributes of municipalities in respect of matters governmental and matters proprietary was the rationale of a decision by which an enactment limiting the hours of labor on public work was annulled on the ground that it violated special laws regulating labor, trade, mining, or manufacturing.²⁵

although such contracts may, as in this case, relate only to matters of purely local improvement. This is a misapprehension of the legislative authority, for no such right or power has been delegated to, or is possessed by, the general assembly. . . . Municipal corporations in their property rights, and their power to make contracts for local improvements for the benefit of their own citizens, are entitled to the same immunities and are protected by the same constitutional guaranties which shield the property of individuals or private corporations from legislative aggression."

²³ "What the terms and stipulations of a contract shall be," said the court (p. 218), "is matter to be determined by the contracting parties; and the right has not been delegated to, nor is it within the power of the general assembly, by mandatory laws, to prescribe the terms and provisions that shall be inserted in contracts that may be made between persons legally competent to contract. Doubtless the legislature might, in the absence of contract between the parties, prescribe the number of hours' labor that should constitute a day's work; but it is not in the power of the legislature, by the enactment of a positive law, to abridge the right of parties to fix by contract the number of hours that shall constitute a day's work, nor to deny effect to the stipulations and agreements

of the parties themselves touching such matter, except only as the exercise of such power may be authorized for the common welfare; and the right to so exercise this power of restraint extends only to matters affecting the public welfare or the health, safety, and morals of the community. . . . The privilege of making and entering into contracts is more than a mere license or liberty. It is a property right. It is an essential incident to the acquisition and protection of property, and is such right as the legislature may not arbitrarily and without sufficient cause either abridge or take away."

²⁴ *Byars v. State* (1909) 2 Okla. Crim. Rep. 481, 102 Pac. 804, Ann. Cas. 1912A, 765.

²⁵ In *Com. v. Casey* (1911) 231 Pa. 170, 34 L.R.A.(N.S.) 767, 80 Atl. 78, reversing (1910) 43 Pa. Super. Ct. 494, the court said: "In the consideration of the question thus presented little is to be gained from the decisions in other states, with respect to laws regulating hours of labor. What may be in strict accordance with the Constitution of another state may be in open conflict with our own; and while it may be that in one or more states, where the constitutional limitations are not unlike ours, decisions are to be found upholding such legislation as we have here, yet, upon examination of the cases, it will be seen that they rest fundamentally on a doc-

2830. Same subject—Validity of municipal ordinances.—The decisions regarding municipal ordinances are no less conflicting than those relating to statutes.

a. California.—An ordinance declaring it to be a misdemeanor for any person, when carrying out a contract with the city, to demand, receive, or contract for more than eight hours' labor in one day from

trine which has not only never been recognized with us, but one which is opposed to the general current of authority. This doctrine so identifies the municipality with the state as to resolve every municipal power and function into an expression of agency derived from the state, whereas that which has met with the more general acceptance distinguishes clearly between those powers and functions in the exercise of which the municipality is the agent and representative of the state, and those which it has been invested with for the accomplishment of ends in which the sovereign has no concern whatever, holding that as to the latter the municipality is to be regarded as a private corporation. The bearing of this distinction upon the present controversy will be apparent when we state the governing question in the case. It is this: Does the act under consideration offend against the constitutional inhibition of special laws regulating labor, art. 3, § 7? If municipalities, notwithstanding the clear distinction between their governmental and proprietary powers, are nevertheless to be regarded in whatever they do as instrumentalities and agents of the sovereign power, then it follows that inasmuch as the state, like the individual, can limit the hours of labor of its own employees, it may impose what regulations it chooses upon its subordinate subdivisions, since the servants of the latter are the servants of the former. If, however, the distinction is to be allowed, and municipalities, with respect to matters not political and governmental, but proprietary and private, are to be regarded as private corporations, with corresponding powers and duties, then the inquiry must be whether the act under consideration is a special or general law. . . . Under the doctrine asserted in all our cases, the city of Pittsburg, in constructing its filtration plant as a necessary part of its water system, was not exercising a right of sovereignty, was not therefore an

agent or instrumentality of the state, but was acting as a private corporation. How, then, does this case stand? The act, by its terms, includes all the municipalities in the state, and it is urged that inasmuch as it includes all of a class, it is therefore not special, but general. It requires no argument to show that this attempt at classification, if so intended, must fail. . . . The basis of all classification is a difference in conditions. When difference in conditions exist to an extent that certain political subdivisions would be oppressed by general laws required for the welfare or convenience of certain other subdivisions, classification may be resorted to to provide proper legislation for each. When no such difference exists, classification is never allowed. It is impossible to suggest a difference between municipal corporations and private corporations that would make a regulation as to number of hours to be employed in a day, suitable for one class, unsuitable for the other. There is no pretense that there is any such difference. So far as labor is concerned, no more is involved in the construction of public works than in private enterprises of like character. The classification here attempted is not with a view to meet the wants of municipal corporations as distinguishable from other corporations, but to ameliorate labor conditions; and it rests on neither distinction nor difference. . . . If this were an attempt by general law to regulate the hours of labor throughout the state, the argument on support of the act, based on legislative exercise of police power, would call for consideration; but, as the case stands, discussion of this larger question would be wholly irrelevant. We rest our decision on the conclusion reached, that the act transcends the power of the legislature, in that it is special with regard to a subject which can only be legislated upon by general law."

any employee has been pronounced void.¹ The position of the court was that such a restrictive provision differed from those which regulated the hours of labor for women and children, and that it could not be held as a sanitary or police regulation, but was "simply an attempt to prevent employing others in lawful business, and paying them for their services, and was a direct infringement of the right to make or enforce contracts."

b. Illinois.—The limitation of the hours of labor on city contracts to eight hours per day by an ordinance providing, in accordance with Chicago Rev. Code, § 1687, for the forfeiture of the contracts in case laborers work more than eight hours in one day, has been held to be unconstitutional as infringing the freedom of contract, discriminating between classes of citizens, restricting competition, and increasing the cost of the work contracted for.²

c. Louisiana.—It has been held that the city council of New Orleans has the right to designate the number of hours in which laborers and mechanics shall work on the public works of the city.³

d. Missouri.—The validity of ordinances declaring that eight hours should constitute a day's work for persons employed in the performance of municipal contracts was affirmed in the cases cited below.⁴

e. Washington.—The constitutionality of an ordinance forbidding the employment of any laborer upon municipal construction work for more than eight hours in each day has been sustained against the objection that it violated the prohibition of the Federal and state Constitutions against taking property without due process of law.⁵

¹ *Ex parte Kuback* (1890) 85 Cal. 274, 9 L.R.A. 482, 20 Am. St. Rep. 226, 24 Pac. 737.

² *Fiske v. People* (1900) 188 Ill. 209, 52 L.R.A. 291, 58 N. E. 985.

³ *State v. McNally* (1896) 48 La. Ann. 1450, 36 L.R.A. 533, 21 So. 27. The court, after remarking that the plea of *ultra vires* would undoubtedly have been good as a bar to a prosecution of the defendant for the violation of the ordinance, proceeded thus: "But the ordinance only regulates the hours of labor on the city public works. The city has the absolute control of its own property, and can regulate the hours of work to be employed on the same. The ordinance violates no law so far as it designates the number of hours in which laborers may be employed on public works. Having this right over its prop-

erty, it has also the right to enforce, by appropriate legislation, the violation of the ordinance fixing the hours for work on city buildings." It was held, however, that the city had exceeded its powers in declaring the violation of the ordinance to be a misdemeanor, as the general assembly alone could create an indictable offense.

⁴ *St. Louis Quarry & Constr. Co. v. Frost* (1901) 90 Mo. App. 677; *Curtice v. Schmidt* (1906) 202 Mo. 703, 101 S. W. 61, 10 Ann. Cas. 702.

⁵ *Re Broad* (1904) 36 Wash. 449, 70 L.R.A. 1011, 78 Pac. 1004, 2 Ann. Cas. 212, where an ordinance declaring it to be unlawful for any contractor upon any of the public works of a city to require or permit any day laborer or mechanic to work more than eight hours in one day was annulled on the ground

2831. Enactments relating to private employments.—The decisions reviewed in this section are conflicting. The principle now established by a judgment of the Federal Supreme Court is that “there is nothing in ordinary labor, by men of full age for more than ten hours a day, that calls for prohibition in the interest of the public health, the public safety, the public morals, or the public welfare.”¹ The reasoning upon which that judgment was based is quite general, and therefore equally applicable to cases involving the question whether a state legislature is authorized to pass laws forbidding employees to work more than ten, twelve, or any greater number of hours than that specified in the enactment under review. But, having regard to the views now held by labor organizations with regard to the proper length of a working day, it is becoming more and more unlikely, as each year passes, that any tribunal, Federal or state, will be called upon to express an opinion as to the question whether a statute placing a higher limit than eight hours is constitutional.

a. California.—The enactment to the effect that the period of employment for all persons employed in underground mines or in smelters, and in institutions for the reduction or refining of ores or metals, shall not exceed eight hours within any twenty-four, and that the hours shall be consecutive, has been upheld against the objection that it violates three provisions of the California Constitution, in that it is a special statute; that it is not of uniform operation; and that it grants to citizens or classes of citizens privileges or immunities which are not on the same terms granted to all.²

b. Colorado.—The statute declaring it to be unlawful to work more than eight hours a day in mines and smelters has been held to be unconstitutional as unwarrantable class legislation, and as interference with the right of contract.³

that it is the constitutional right of persons to contract with reference to compensation for their services, where such services are neither unlawful nor against public policy in the employment such as might be unfit for certain classes of persons—as females and infants. That the attention of the court was not directed to the theory that the powers of a legislature are more extensive in respect of public than in respect of private work is shown by the fact that two of the cases relied upon related to the latter description of work.

¹ Purport of the *Lockner Case* (see

subs. *g*, *infra*), as stated in *Re Opinion of Justices* (1911) 208 Mass. 619, 622, 34 L.R.A. (N.S.) 771, 94 N. E. 1044.

² *Re Martin* (1909) 157 Cal. 51, 26 L.R.A. (N.S.) 242, 106 Pac. 235.

³ *Re Morgan* (1899) 26 Colo. 415, 47 L.R.A. 52, 77 Am. St. Rep. 269, 58 Pac. 1071 (Acts of 1899, p. 232). The court said: “We have no constitutional provision which authorizes the legislature to single out workingmen in underground mines and smelters, and impose upon them restrictions as to the number of hours they shall work at these industries, from which workingmen in all

Adverting to the cases relating to the Utah statute (see subsec. *j*, *post*), the court considered it to be clear, first, that the decision of the supreme court of that state was not an authority, for the reason that it was based entirely upon the mandatory nature of a provision of the Constitution of that state which was not found in the Colorado Constitution; and, secondly, that the judgment of the Supreme Court of the United States by which that decision was affirmed was not a precedent in construing the Colorado act, because

other departments of industry are exempt. . . . The act is equally obnoxious to the provisions of our Bill of Rights. . . . Liberty means something more than mere freedom from physical restraint. It includes the privileges of choosing any lawful occupation for the exercise of one's physical and mental faculties which is not injurious to others. The right to acquire and possess property includes the right to contract for one's labor. The latter is essentially a property right. . . . That this act infringes both the right to enjoy liberty and to acquire and possess property seems too clear for argument. . . . The limitation is claimed to be warranted on the ground that these and all other constitutional guaranties must yield to the paramount and sovereign right of the state to exercise its police power to protect the public health; . . . Were the object of the act to protect the public health, and its provisions reasonably appropriate to that end, it might be sustained; for in such a case even the constitutional right of contract may be reasonably limited. But the act before us is not of that character. In selecting a subject for the exercise of the police power, the legislature must keep within its true scope. The reason for the existence of the power rests upon the theory that one must so use his own as not to injure others, and so as not to interfere with or injure the public health, safety, morals, or general welfare. How can one be said injuriously to affect others, or interfere with these great objects, by doing an act which confessedly visits its consequences on himself alone? And how can an alleged law, that purports to be the result of an exercise of the police power, be such in reality, when it has for its only object, not the protection of others, or of the public health, safety, morals, or general welfare, but the wel-

fare of him whose act is prohibited, when, if committed, it will injure him who commits it, and him only? The maxim does not read, So use your own right or property as not to injure yourself or your own property. Perceiving the inconsistency that must follow an attempt to vindicate a law on the principle that underlies the police power, counsel adroitly invoke the maxim, *Salus populi suprema est lex*. So far as we can ascertain, no commentator and no judge has ever sought to borrow this wholesome maxim and use it as a prop to uphold a law whose object is to protect a man against himself. The welfare of the people is indeed the supreme law, but this maxim cannot be twisted to sustain a law violating private rights, which contemplates the promotion of the welfare of less than the entire people. . . . What we mean to decide is that in a purely private, lawful business, in which no special privilege or license has been granted by the state, and the carrying on of which is attended by no injury to the general public, it is beyond the power of the legislature, under the guise of the police power, to prohibit an adult man who desires to work thereat from working more than eight hours a day, on the ground that working longer may, or probably will, injure his own health. . . . In some of the other cases are found such expressions (*dicta*, it is true) as that the state has such an interest in each citizen that it may protect him against the consequences of his own rashness, and upon the theory that the state is made up of the sum of all its parts, it may, for each individual, and for his supposed good, prescribe any regulations that are appropriate and suitable for the whole. In other words, this theory is based upon the proposition that each part making up the whole includes the whole itself, in the same sense that the

the sole question presented to it was whether or not the Utah act violated the Federal Constitution. It is submitted, however, that the conception which the latter of these propositions embodies with respect to the actual scope of the Federal decision is untenable. Even if it should be conceded that the proposition is literally correct, it seems clear that, having regard to the essential similarity between the provisions in the Federal Constitution, which were declared not to have been violated, and those in the Colorado Constitution, the decision in question should, in any reasonable view, have been treated as an absolute controlling precedent. But apart from this consideration, it is abundantly evident from the judgment of the Federal court, that it intended to rest its conclusion upon certain general principles which were deemed to be pertinent in determining the limits of the police power in cases of the type under discussion. In this point of view, also, its decision was plainly binding upon the Colorado court.⁴

c. Missouri.—The statute declaring it unlawful for persons engaged in mining and making excavations beneath the surface of the earth, while searching for minerals or other valuable substances, to work their employees more than eight hours a day, has been held to be a proper exercise of the police power of the legislature, and not to be special or class legislation.⁵ In the case cited it was also laid down that expert testimony going to show that a certain employment is not

whole includes each part. . . . It is a legitimate function of government to levy and collect taxes to build such institutions. The argument in support of such a theory is specious, and, while in one sense (but to a limited extent only) true, yet, like all argument from analogy, it is dangerous, and should be carefully circumscribed. If the theory is correct, the state would be justified in prescribing the most minute details for the regulation of the personal conduct of individuals citizens, as to things in no wise affecting the great public interests. Whenever a man fails in business, or loses a fortune by some great calamity, or droughts or floods destroy his crops, the legislature could levy a tax or make an appropriation, and therefrom establish him in business or make good the loss. The practical application of the theory would destroy the fundamental principles, upon which our government is founded." In this judgment the court reiterated the opinions which it had previously expressed when it was consulted while the statute was under

consideration in the legislature. See *Re Eight Hour Law* (1895) 21 Colo. 29, 39 Pac. 328.

⁴ Such was the view adopted in *State v. Cantwell* and *Ex parte Boyce*, notes, 5 and 11, *infra*.

⁵ *State v. Cantwell* (1904) 179 Mo. 245, 78 S. W. 569. The court said: "It is apparent that, if the act before us is reasonably adapted to the end and purpose for which it was enacted, and was not enacted under the guise of a mere police regulation, when it is not such in fact, then the validity of the act should be upheld." In this point of view there was held to be no ground for declaring it invalid. The court quoted the general statement in *Ritchie v. People* (1895) 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454, (see § 2836, *post*), regarding the scope of the police power, and said with regard to the contention that the act made a distinction between persons working underground in search of minerals and those working underground not in search of minerals: "This act only applies to the class searching

attended with danger to the health of those engaged in it was inadmissible for the purpose of proving that the statute was not necessary.⁶

On the other hand, an enactment which provided that no employee should be "required, permitted, or suffered to work in a biscuit, bread, pastry, or cake bakery, or other bakery or confectionery establishment, more than six days in one week, said week to commence at a stated time P. M. on Sunday," was pronounced void on the grounds that it was an arbitrary interference with the right of contract, guaranteed by the Federal and state Constitutions, and that it could not be upheld as a sanitary provision, there being nothing in the work that made it more unhealthy than that of many other kinds of labor.⁷

d. Montana.—It has been held that the statute which prohibits the employment for more than eight hours a day of laborers in ore mills, smelters, and mines is a proper exercise of police power, and is not invalid as an infringement of the right of contract.⁸

for minerals; as to that class, it makes no distinction. The legislature doubtless realized the necessity of the provisions of this act being made applicable to those in search of minerals. The operation of mines is a permanent business, lasting frequently for many years; on the other hand, the digging of a well, or the running of a tunnel, is not to be classed as a business. It is work that is completed in a comparatively short time. Hence, there was absolutely no reason or necessity for including in the act those who might, in the construction of railroads or other work, incidentally be required to work beneath the surface of the earth. The crucial test as to the validity of this act is narrowed down to the simple question: Is the business of operating mines and searching for minerals beneath the surface of the earth, in this state, of that character which would reasonably justify the lawmaking power in distinguishing this class in such business for the purposes of preservation of the health and safety of the employees engaged in such work?" As bearing upon this question, references to the history of the growth of the mining industries in the United States, and the tendency of the legislatures of the various states to enact appropriate and reasonable laws for the preservation of the health and safety of those engaged in the operation of such

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work, were considered. The conclusion was reached that the distinction made by the statute was not unreasonable or arbitrary. In answer to the argument of counsel that *Holden v. Hardy*, 169 U. S. 363, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, was not a controlling precedent for the reason that it was based upon the peculiar provisions of the Constitution of that state, the court said: "No one can read the case and escape the conclusion that it is a clear, full, and exhaustive discussion of the principle involving the exercise of police power by the enactment of a law in all respects similar to the one before us for consideration. While it is true reference is made to the express provisions of the Constitution of Utah, in respect to the operation of mining industries, yet the principles announced are applicable to any state where, under the Constitution, laws may be enacted in the exercise of the police power of the state." This decision was affirmed without any opinion in (1905) 199 U. S. 602, 50 L. ed. 329, 26 Sup. Ct. Rep. 749.

⁶ For another ruling to the same effect, see subs. *f*, *post*.

⁷ *State v. Miksicek* (1910) 225 Mo. 561, 135 Am. St. Rep. 597, 125 S. W. 507.

⁸ *State v. Livingston Concrete Bldg. & Mfg. Co.* (1906) 34 Mont. 570, 87 Pac. 980, 9 Ann. Cas. 204 (Laws 1905, chap.

The statute limiting the hours of work upon railways has been upheld, as being a proper exercise of the police power, the consideration relied upon being that in so dangerous and exacting an occupation the continuance of service beyond a reasonable time in each day tends to impair the health and efficiency of the employees, and consequently to imperil the safety of the persons and property conveyed on trains.⁹

e. Nebraska.—The statute which provides that for all classes of mechanics, servants, and laborers, excepting those engaged in farm and domestic labor, a day's work should not be longer than eight hours, and that for each hour in excess of that time, the employer should pay twice as much as for the preceding hour, has been held invalid, both because the exceptive clause rendered it special legislation, and because it interfered with the right to make contracts with reference to the rate of compensation for services.¹⁰

f. Nevada.—The statute which provides that the period of employment in mines and smelters shall be eight hours a day has been declared to be a valid health law.¹¹ In one of the cases in which

50, § 1). With regard to the general question of the constitutionality of enactments of this type, the court followed *Holden v. Hardy*, subs. *c*, *supra*. The particular objection that the statute was harsh, in that no provision was made for cases of emergency where life or property was in peril, was thus disposed of: "If it was the legislative will that no exception be made to the rule announced, the courts cannot say that a different policy should have been pursued. In fact, these objections only raise the question of legislative policy, with which the courts have nothing to do, unless it should be made to appear that in its operation the act would be so unreasonable that it could not be supposed that the legislature ever intended it to have such effect. 20 Am. & Eng. Enc. Law, 2d ed. 599. Whether this statute in its operation will in fact prove to be harsh can only be determined by experience, and a probability that it will do so is not sufficient to condemn the act in advance."

⁹ *State v. Northern P. R. Co.* (1908) 36 Mont. 582, 15 L.R.A.(N.S.) 134, 93 Pac. 945, 13 Ann. Cas. 144.

¹⁰ *Low v. Rees Printing Co.* (1894) 41 Neb. 127, 24 L.R.A. 702, 43 Am. St. Rep. 670, 59 N. W. 362 (Neb. Sess. Laws 1891, chap. 54, §§ 1, 3). It was

further held that, as an inspection of the entire act showed that provisions thus pronounced invalid formed an inducement to the passage of the act, no part of it could be sustained as constitutional.

¹¹ In *Ex parte Boyce* (1904) 27 Nev. 299, 65 L.R.A. 47, 75 Pac. 1, 1 Ann. Cas. 66 (act Feb. 23, 1903, Stat. 1903, p. 33, chap. 10), criticizing the Colorado case of *Re Morgan* (see subsec. *b*, *supra*), the court expressed the opinion that "the Colorado court had no different and substantial reason for deciding contrary to the Supreme Court of the United States. When, as held by the highest court in the land, the power of the legislature, as applied to a similar statute in Utah, cannot be stayed by the 14th Amendment, we must conclude that is it not nullified by the state Constitution—an instrument less potential, and not broader in its relevant guaranties. . . . We think the better reasoning and correct distinction are with the Supreme Court of the United States and the cases in line with its decisions. As we have already shown, the objection to the statute as being special legislation was held to be untenable by that Court, and its opinion based squarely on the fact that the legislature, in the exercise of its police pow-

this position was taken, it was held that, since the statute was sustainable as a proper exercise of the police power, by reason of the fact that as a matter of common knowledge, prolonged labor in such places is injurious, evidence that particular reduction works and mills, including the one in which petitioner worked, were healthful, was inadmissible.¹² In the same case it was declared not to be in violation of the 8th Amendment to the Federal Constitution, forbidding the imposition of excessive fines and cruel and unusual punishments.

g. New York.—The enactment which provides that no employee shall be required or permitted to work in a bakery for more than

er, could, by limiting the hours of labor, provide for the protection of the health of the men employed in underground mines and smelters. If the statute has been objectionable as class legislation, that court would have held it to be a denial of the equal protection of the laws under the 14th Amendment to the Federal Constitution. Of necessity, many laws must refer to certain classes; . . . and generally a health regulation must be limited, as a matter of fact, if not in direct statutory terms, to that class which will be affected, for no others could receive protection. It is necessary that the law affect all persons alike in the same class and under similar conditions. These requirements are met by the statute, for it controls all alike, and extends to every man who engages in underground mining, or in the smelting and milling of ores, and becomes subject to the dangers incident to those occupants."

¹² *Ex parte Kair* (1905) 28 Nev. 127, 113 Am. St. Rep. 817, 80 Pac. 463, 6 Ann. Cas. 893, judgment affirmed on rehearing in 28 Nev. 425, 82 Pac. 453, 6 Ann. Cas. 897. On the first hearing the court argued thus: "A review of the decisions indicates that the courts have acted in cases similar to the one under consideration, generally upon judicial cognizance, or, if in doubt, have accepted the judgment of the legislature or received proof. . . . If we were not satisfied, as a matter of common knowledge, that prolonged labor in the employment restricted by the statute is injurious to the health of the workmen as a class, we would determine, regarding the admissibility of evidence in this connection, to enlighten the court and control the judgment and act of the legislature; but, being so satisfied, we

do not deem it expedient to allow testimony in particular or exceptional cases to defeat the constitutionality of the act. It is not difficult to distinguish between employments which in principle are not unhealthful or injurious, as a class, and those which are, and a statute relating to the latter ought not to be nullified or rendered uncertain in its operation because some of the employees may possibly be exempt from injury." On the second hearing, which took place after the decision of the Supreme Court of the United States in the *Lochner Case* (1905) 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539 (note 15, *infra*), was rendered, the court used the following language: "If, for the purpose of the argument, it be conceded that no one has been seriously affected in health by laboring in this particular mill during the past few years, and that the petitioner has followed with impunity his avocation for a period longer than the usual life, this does not prove that months and years of labor in this and other quartz mills may not disable or greatly injure men of common physical powers. The evil results are not always immediate nor easily ascertained in advance. Minds may honestly differ as to whether they will ever occur. Under certain conditions some, and especially those who are interested, may earnestly believe that particular mills and part of the labor in them should be immune from this enactment; but the future may prove the wisdom of the legislature in regard to them, as the past has done concerning underground mines and institutions generally for the reduction of ores. If exceptions were to be made, based on the peculiarities of the mill or its method of operation, or on the

sixty hours a week, or more than ten hours in one day, unless for the purpose of making a short day on the last day of the week, was pronounced by four out of seven of the judges of the court of appeals to be a valid exercise of the police power, and not to be in conflict either with the provision in the 14th Amendment of the Federal Constitution, which forbids states to pass laws abridging the privileges and immunities of the citizens of the United States, or with the provision in the New York Constitution which declares that no member of the state shall be deprived of any of the rights or privileges secured to any citizen thereof, unless by law of the land or the judgment of his peers, nor be deprived of life, liberty, or property, without due process of law.¹³ This decision was reversed by the Supreme Court of the United States, (see below), but the great importance of the principles involved, and the fact that the reversal was concurred in by only five members of the higher tribunal, afford an ample justification for inserting some extracts from the opinions delivered in the state court.¹⁴

chemicals used, or on the ingredients of the ore, or on the ability of some workmen to maintain their health longer than others, there would be great uncertainty and much litigation in securing the benefits of the act, and it could thereby be nullified to a great extent."

¹³ *People v. Lochner* (1904) 177 N. Y. 145, 101 Am. St. Rep. 773, 69 N. E. 373, affirming (1902) 73 App. Div. 120, 76 N. Y. Supp. 396, a decision by three out of five judges (N. Y. Laws 1897, p. 485, chap. 415, art 8, § 110).

¹⁴ Parker, Ch. J., said (p. 162): "It is but reasonable to assume from this statute as a whole that the legislature had in mind that the health and cleanliness of the workers, as well as the cleanliness of the work rooms, was of the utmost importance, and that a man is more likely to be careful and cleanly when well, and not overworked, than when exhausted by fatigue, which makes for careless and slovenly habits, and tends to dirt and disease." Gray, J., said (166): "If it stood alone, unaccompanied and unexplained by cognate provisions, I should incline to view that the enactment was unconstitutional. It might, justly, be held to fall within that class of legislation, which has received judicial condemnation; because, as a regulation of the

hours of the employed, its object would appear to be for their protection against the exaction of a disproportionate amount of work for the wages paid. That would be to infringe upon the liberty of contract. But I think we must read the section in connection with those sections which immediately follow, and then it is that we find it to be made certain that the object of the legislative enactment had relation to the conservation of the public health. We perceive that the legislature is dealing with the workings of a business conducted upon a scale, calling for the employment of more or less laborers, and which is affected by a public interest, in the sense that the food product may sensibly depend for its healthfulness upon the observance of sanitary rules and precautions. Such precautionary regulations may involve, as well, the establishment of proper conditions to insure the maintenance of the normal vitality of the workman, as the wholesomeness of the general environment. We must presume that the legislative body was animated by a reasonable intention to promote the public welfare; and if the courts can give effect to it, because tending to guard the public health, they should, unhesitatingly, do so." Vann, J., said: "I do not think the regulation

The essence of the conclusion embodied in the reversing judgment of the Federal Supreme Court is that "the act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor, upon such terms as they may think best, or which they may agree upon with the other parties to such con-

in question can be sustained, unless we are able to say, from common knowledge, that working in a bakery and candy factory is an unhealthy employment. If such an occupation is unhealthy, the legislature had the right to prohibit employers from requiring or permitting their employees to spend more than a specified number of hours per day or week in the work, because such a command would be in the interest of the public health and would promote the general welfare. As in the *Jacobs Case* we took judicial notice of the nature and qualities of tobacco (p. 113), so in this case we may take judicial notice of the effect of very fine particles of flour and sugar when inhaled into the lungs from the heated atmosphere of manufactories of bread and candy. Necessarily, in considering the subject, we may resort to such sources of information as were open to the legislature. Vital statistics show that those vocations which require persons to remain for long periods of time in a confined and heated atmosphere, filled with some foreign substance, which is inhaled into the lungs, are injurious to health and tend to shorten life. Bakers and confectioners, who, during working hours, constantly breathe air filled with the finest dust from flour and sugar, have a tendency to consumption, the most terrible scourge known to modern civilization, and resulting in more deaths than other disease." O'Brien, J. (with whom Bartlett and Martin, JJ., concurred) agreed with the majority of the court in regard to the general principle that "an act is valid which provides that, in an employment which the legislature deems, and which is in fact, to some extent detrimental to health, no person, regardless of age or sex, shall be permitted or required to labor more than a certain number of hours per day or week. Such legislation, under such circumstances, is a health law and is a valid exercise of the police power." But he was of the

opinion that there was nothing on the face of the law nor in its manifest operation to show that it had any relation to the public health." The learned judge argued thus (p. 182): "Laws which encroach upon the person or property rights of the citizen, as guaranteed by the Constitution, are generally defended upon the ground that they are police regulations; but the courts have prescribed a test by means of which their true character and purpose may be known. The rule is that the court must be able to say judicially that the statute in question is a health law, and has some appropriate relation to the promotion or protection of health. It will not be deceived or misled by mere names or pretenses. The cases are numerous in which the courts have condemned statutes as invasions of the rights secured to the citizen by the Constitution, though enacted or sought to be upheld under the guise of health laws or other police regulations. They all arrive at the same result, and that is that the legislature may not, under the guise of a statute to protect against some wrong, real or imaginary, arbitrarily strike down private rights and invade personal freedom or confiscate private property. The police power must be exercised within its appropriate sphere and by appropriate methods. . . . It will not do to say that the legislature, in enacting the statute in question, may have thought that it was a health law, or had some relation to health. The action of the legislature, or its views or reasons for the passage of the law, does not conclude the courts, but they must determine for themselves whether in any given case the legislation, which is claimed to be an exercise of the police power, is really what it is claimed to be. Every labor law, however stringent and arbitrary, could just as well be upheld upon the ground that it is a health law; but in all the discussions that have been had in the courts for many years concerning the

tracts.”¹⁵ The opinion was expressed that, viewed in the light of a purely labor law, with no reference whatever to the question of health, an enactment like the one before the court involved neither the safety, the morals, nor the welfare of the public; that the interest of the public was not in the slightest degree affected by it; and that it must be upheld, if at all, as one pertaining to the health of indi-

validity of legislation of this character, there are to be found but very few cases where it was even claimed that the statute was enacted for the purpose of preserving or promoting health, or that it had any relation whatever to that subject. When it is manifest, as it is in this case, that the law has no relation whatever to the subject of health, and that its real object and purpose was to regulate the hours of labor, between master and servant, in a business which is private, and not dangerous to morals, or to health, freedom to contract with each other, defining their mutual obligations, cannot be prohibited without violating the fundamental law. . . . The section of the labor law with which we are now concerned can borrow no strength from its association with other sections of the statute that may be good. The single section of the labor law that we are now dealing with must stand or fall upon its own intrinsic character, and can receive no support from the company in which it is found. . . . What the learned district attorney urges upon us is that, since the section is found in the article associated with other sections prescribing sanitary regulations, we must assume that the legislators, for some unexpressed reason sufficient to them, reached the conclusion that a baker ought not to be permitted or required to work on an average of more than ten hours in a day. Of course this reasoning is without force, and does not meet the difficulty.” Referring to the process of making bread, he continued: “It has never been supposed that it was a trade or vocation that was or might be dangerous to health, morals, or good order, or that there was anything about it to justify legislation restricting the right of the master and servant to make their own contracts, express or implied, with respect to hours of work or the terms of employment. There is nothing in the record before us from which it can be inferred that there was any ground for the passage of the

statute as a police regulation for the protection of health, morals, or good order, and, hence, it cannot be upheld as an exercise of the police power. It is plain discrimination against a limited class of people who happen to be obliged to employ labor in the manufacture of bread, biscuit, or confectionery in those places called bakeries. This relatively small class are restricted by the statute to the regulations there prescribed with respect to the hours of labor by their employees, and are prohibited from agreeing with them as to the time they are to work, even though extra pay should be given for over work, a right which the law gives all other persons employing labor. If the legislature can do all this, then the right to enact what wages the servant shall receive per day or per hour must necessarily follow as an inevitable conclusion. A statute fixing the wages of the servant at such a sum as to enable him to live more comfortably could be defended as a health law by the same argument and authority adduced in support of the section of the present law, the violation of which is the only crime charged.”

¹⁵ *Lochner v. People* (1904) 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133, Peckham, J., after making this statement, continued thus: “Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health, or to the health of the employees, if the hours of labor are not curtailed. If this be not clearly the case, the individuals whose rights are thus made the subject of legislative

viduals engaged in the occupation of a baker. To the contention that the law might be sustained on the ground that "it is to the interest of the state that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power," was met with the remark that, if this be "a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so-called, as well as contract, would come under the restrictive sway of the legislature." It was declared that there was no reasonable foundation for holding the statute to be necessary or appropriate as a health law to safeguard the public health, or the health of persons following the trade in question.¹⁶

interference are under the protection of the Federal Constitution regarding their liberty of contract as well as of person; and the legislature of the state has no power to limit their right as proposed in this statute. All that it could properly do has been done by it with regard to the conduct of bakeries, as provided for in the other sections of the act. . . . It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to, and no such substantial effect upon, the health of the employee, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, *sui juris*), in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution."

¹⁶ The following remarks were made with regard to the question of fact upon which the validity of the statute depended (p. 59): "We think that there

can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the government. It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may pos-

The argument that the restriction of the hours of labor in the case of bakers was valid "because it tended to cleanliness on the part of the works, as a man was more apt to be cleanly when not over-worked, and if cleanly, then his output was more likely to be so," was considered to be insufficient to justify the legislature in passing the law.

Harlan, J., who delivered one of the dissenting opinions, observed (p. 68) that the conditions under which the judiciary may declare statutes which interfere with freedom of contract to be in excess of legislative authority are to be determined with reference to the rule that an enactment, Federal or state, "is never to be disregarded or held invalid, unless it be, beyond question, plainly and palpably in excess of legislative power." The statute in question he considered to have been plainly enacted to protect the physical well-being of those who work in bakery or confectionery establishments.¹⁷ He quoted some striking statements of medical writers with regard to the extremely unhealthy character of the labor of bakers, and referred briefly to the difference of opinion among economists regarding the extent to which it is justifiable for the state to interfere with the industrial freedom of its citizens. These broader economic aspects of the matter he deemed it unnecessary to discuss, saying (p.

sibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's, or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family."

¹⁷The learned judge observed: "It may be that the statute had its origin, in part, in the belief that the employers and employees in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength. Be this as it may, the statute must be taken as expressing the belief of the

people of New York that, as a general rule, and in the case of the average man, labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor. Whether or not this be wise legislation, it is not the province of the court to inquire. Under our systems of government, the courts are not concerned with the wisdom or policy of legislation. So that, in determining the question of power to interfere with liberty of contract, the court may inquire whether the means devised by the state are germane to an end which may be lawfully accomplished, and have a real or substantial relation to the protection of health, as involved in the daily work of the persons, male and female, engaged in bakery and confectionery establishments. But when this inquiry is entered upon I find it impossible, in view of common experience, to say that there is here no real or substantial relation between the means employed by the state and the end sought to be accomplished by its legislation."

72): "It is enough for the determination of this case, and it is enough for this court to know, that the question is one about which there is room for debate and for an honest difference of opinion. There are many reasons of a weighty, substantial character, based upon the experience of mankind, in support of the theory that, all things considered, more than ten hours' steady work each day, from week to week, in a bakery or confectionery establishment, may endanger the health and shorten the lives of the workmen, thereby diminishing their physical and mental capacity to serve the state and to provide for those dependent upon them." These considerations apparently afforded a perfectly satisfactory ground for affirming the validity of the enactment in question. It is difficult to avoid the conclusion that the action of the majority of the court in overruling the opinion of the legislature as to the essentially unhealthy character of work in bakeries involved, under the given circumstances, a real departure from the general principle which the same tribunal had previously formulated as a suitable criterion for determining whether an enactment which was professedly passed as a "health law" should be upheld as such. See subsec. *j*, *infra*. The annulment of the statute under discussion seems to have contravened that principle as clearly as the reversal of a verdict based upon evidence from which reasonable men might with propriety draw different conclusions would contravene a fundamental rule of common-law procedure.

The essence of the position taken by Justice Holmes is indicated by the statement with which his opinion begins, *viz.*; "This case is decided upon an economic theory which a large part of the country does not entertain."¹⁸ With this view the present writer ventures

¹⁸ See p. 74. The learned judge continued thus: "If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state Constitutions and state laws may regulate life in many ways which we, as legislators, might think as injudicious, or, if you like, as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury

laws are ancient examples. A more modern one is the prohibition of lotteries. . . . The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . A Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States. . . . I think that the word 'liberty,' in

to express his concurrence. But the current of decisions has been running so strongly against it for more than a quarter of a century, that there is virtually no possibility of its now prevailing, even on the authority of so eminent a judge as the one who propounded it.

An enactment (now repealed) which provided that ten hours' work in twelve hours should be considered a day's work on railroads, and that, if employed longer, the employee should receive proportional compensation for the extra service, was held by the supreme court not to be an unconstitutional interference with the property rights of railroad companies. The *ratio decidendi* was that by such an enactment the rate of wages was not fixed, nor the making of special contracts forbidden. Its effect was merely to create a liability which the law would imply, in the absence of a special agreement.¹⁹ A more recent statute by which it was declared to be unlawful to require or permit any telegraph or telephone operator who directs the movements of trains to remain on duty more than eight hours in a day of twenty-four has been upheld by the court of appeals.²⁰

the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss."

¹⁹ *People v. Phyfe* (1890) 48 N. Y. S. R. 350, 20 N. Y. Supp. 461. The judgment of the supreme court in this case was reversed by the court of appeals (see [1893] 136 N. Y. 554, 19 L.R.A. 141, 49 N. Y. S. R. 680, 32 N. E. 978); but the question of constitutionality was not discussed.

²⁰ *People v. Erie R. Co.* (1910) 198 N. Y. 369, 29 L.R.A. (N.S.) 240, 139 Am. St. Rep. 828, 91 N. E. 849, 19 Ann. Cas. 811. In delivering the opinion of the court, Hiscock, J., said: "I do not

think . . . that we can say that the facts so conclusively show a lack of relation between the legislation and the justifiable ends sought to be gained that we can condemn the statute as unconstitutional. For, while each of the duties performed by the operator seemed simple enough, still as a whole they form quite a complicated series of acts in the transmission of signals, and giving of orders and the movement of trains, and while the actual time occupied in performing these acts is not large, still the employee for the proper discharge of his duties is compelled to be on the alert during the entire time of his employment, and it not infrequently happens that lack of active occupation during hours of duty is more trying than work itself. Thus it is not all inconceivable that such an employee subjected to too long hours of duty and confinement might become physically fatigued and mentally inert, and make mistakes which would lead to the destruction of life. This being so, it was permissible for the legislature to pass a statute limiting the hours of labor, and it cannot be said that there is no reason or argument to support its judgment that eight hours was a proper limit. The control of such a matter by the legislature would naturally be

h. Ohio.—By one of the inferior courts the statute which provides that ten hours shall constitute a day's work for certain classes of railway employees, has been pronounced invalid, as being in conflict with the provision in the state Constitution which guarantees the right of enjoying liberty, and acquiring, possessing, and protecting property, and also as denying the equal protection of the laws, and depriving citizens of their property without due process of law.²¹

i. Rhode Island.—It has been laid down that the legislature is authorized, under its police power, to limit the working hours of certain employees of a street railway corporation to ten out of twenty-four.²²

exercised by virtue of the police power. If the form of the statute in question could be criticized as relating only to corporations engaged in the operation of railroads, and therefore unduly discriminatory against them, it now being settled that an individual as well as a corporation may operate a railroad (*Phoenix v. Gannon* [1909] 195 N. Y. 471, 88 N. E. 1066), I think that we might take judicial notice of the fact that all of the railroads in the state to which this act could apply are and almost necessarily must be operated by corporations, and not by individuals, since the latter have no power to acquire land by eminent domain for railroad purposes. *Hammond Packing Co. v. Arkansas* (1908) 212 U. S. 322, 53 L. ed. 530, 29 Sup. Ct. Rep. 370, 15 Ann. Cas. 645. Moreover, even if the statute failed as a valid exercise of the police power, personally I am not doubtful that under its reserved control over corporations the legislature might pass such an act in regulation of the performance of the business for which a railroad was organized."

²¹ *Wheeling Bridge & Terminal R. Co. v. Gilmore* (1894) 8 Ohio C. C. 658, 4 Ohio C. D. 366 (act of April 14, 1886). It was laid down that, except in so far as the exercise of the police power was concerned, the state has no more right to interfere with the contracts of railway servants who are *sui juris* than with those of other classes of employers.

²² In *Re Ten Hour Law*, (1907) 24 R. I. 603, 61 L.R.A. 612, 54 Atl. 602. (opinion of supreme court with regard to Pub. Laws, chap. 1004, act of April 4, 1902), referring to *Holden v. Hardy*, subsec. j, *infra*, the court said: "That decision goes much farther than the

question here presented, because the law affected cases based primarily on private contracts. The law before us is more clearly within such [*i. e.*, police] power, for the triple reason that it deals with public corporations, the use of a public franchise, and a provision for public safety. It has been held, in many cases, that any one of these grounds is sufficient to sustain an exercise of the police power." The objection that the act infringed the right of contract was considered to be answered by the same decision, since "the police power stands above private rights in matters affecting the public welfare." Reference was also made to *State v. Dalton* (1900) 22 R. I. 77, 48 L.R.A. 775, 46 Atl. 234, in which it had been laid down that the right of contract is "impaired whenever the legislature prohibits a man from carrying on his business in his own way, provided . . . that it is not a business which is affected with a public use or interest." The law in question was declared to be clearly within the latter proviso. Replying to the objection that the law was not a proper exercise of police power, because it exempted from its operation cases of existing written contracts, the court said: "While there may be no obvious reason for exempting from the operation of the present statute cases of existing written contracts under which there might be as great danger to the public from the strain of excessive labor as in cases where there is no such contract, so, on the other hand, such exemption is not obviously arbitrary, partial, or oppressive. Assuming knowledge of the facts on the part of the legislature, it may be that written contracts were so few, or held by men of

j. Utah.—By the Supreme Court of the United States, the validity of the Utah enactment which prohibits the employment of workmen in underground mines or workings more than eight hours a day, except in cases of emergency, where life or property is in imminent danger, has been sustained against the objections that it violates the 14th Amendment to the Federal Constitution by abridging the privileges or immunities of its citizens, by depriving them of their property without due process of law, and by denying to them the equal protection of the laws. The decisions which had been adduced in support of the contention that statutes restricting the hours of labor are unconstitutional were dismissed with the remark that “they have no application to cases where the legislature had adjudged that a limitation is necessary for the preservation of the health of employees, and there are reasonable grounds for believing that such determination is supported by the facts. The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class.”²³

such experience and skill, or applicable to such conditions of labor, as to make the exemption reasonable and proper so far as the public are concerned. It is a general rule that a law must apply equally to all of the class affected by it, and this law applies to all contracts for labor on street railroads other than those under existing written contracts. It is prospective in its operation, and as the written contracts expire it will embrace all. The mere fact that one class is not embraced in a law when it might be is not enough of itself to render the law invalid.”

²³ *Holden v. Hardy* (1897) 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, affirming *State v. Holden* (*Holden v. Hardy*) (1896) 14 Utah, 71, 37 L.R.A. 103, 46 Pac. 756 (act of March 30, 1896). In that case an employer was arrested under a warrant issued upon a complaint charging him before a justice with a contravention of the statute. He admitted the facts, but set up the defense that they did not constitute a crime, because the statute was repugnant to the Constitution of the United States. The petitioner, having been convicted, sued out a writ of habeas corpus from the supreme court of the state, annexing a copy of the proceedings before the justice of the peace, and

praying his discharge. The supreme court denied his application, and remanded him to the custody of the sheriff, whereupon he sued out a writ of error, in the Federal Supreme Court, assigning the unconstitutionality of the law. After reviewing various cases decided with reference to the 14th Amendment of the Federal Constitution, the court observed that they “demonstrate that, in passing upon the validity of state legislation under that amendment, this Court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some of the states methods of procedure, which at the time the Constitution was adopted were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals, or of classes of individuals, had proved detrimental to their interests; while, upon the other hand, certain other classes of persons, particularly those engaged in dangerous or unhealthful employments, have been found to be in need of additional protection.” It was furthermore laid down that the right of contract is “subject to certain limitations which the state may lawfully im-

pose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employees as to demand special precautions for their well-being and protection, or the safety of adjacent property. . . . While the business of mining coal and manufacturing iron began in Pennsylvania as early as 1716, and in Virginia, North Carolina, and Massachusetts even earlier than this, both mining and manufacturing were carried on in such a limited way and by such primitive methods that no special laws were considered necessary, prior to the adoption of the Constitution, for the protection of the operatives; but, in the vast proportions which these industries have since assumed, it has been found that they can no longer be carried on with due regard to the safety and health of those engaged in them, without special protection against the dangers necessarily incident to these employments. In consequence of this, laws have been enacted in most of the states, designed to meet these exigencies, and to secure the safety of persons peculiarly exposed to these dangers. . . . These statutes have been repeatedly enforced by the courts of the several states; their validity assumed, and, so far as we are informed, they have been uniformly held to be constitutional. . . . But if it be within the power of a legislature to adopt such means for the protection of the lives of its citizens, it is difficult to see why precautions may not also be adopted for the protection of their health and morals. It is as much for the interest of the state that the public health should be preserved as that life should be made secure. . . . Upon the principles above stated, we think the act in question may be sustained as a valid exercise of the police power of the state. The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction, or refining of ores or metals. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employees, and, so long as there are reasonable grounds for believing that

this is so, its decisions upon this subject cannot be reviewed by the Federal courts. While the general experience of mankind may justify us in believing that men may engage in ordinary employments more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases, generated by the processes of refining or smelting." Another passage which may be quoted is the following: "The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority. It may not be improper to suggest in this connection that, although the prosecution in this case was against the employer of labor, who apparently under the statute is the only one liable, his defense is not so much that his right to contract has been infringed upon, but that the act works a peculiar hardship to his employees, whose right to labor as long as they please is alleged to be thereby violated. The argument would certainly come with better grace and greater cogency from the latter class. But the fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all

C. ENACTMENTS RELATING TO THE ABANDONMENT OF THE SERVICE BY EMPLOYEES.

2832. Generally.—In a case in which the congressional statute that authorizes the arrest of deserting seamen, and their return to the vessels which they have abandoned, was held not to be in conflict with the 13th Amendment of the Federal Constitution, by which slavery and involuntary servitude is abolished, Brown, J., after referring in the opinion delivered by him for the majority of the court, to the English statutes, which provided for the imprisonment of servants who left their employment without a valid reason, remarked: "The breach of a contract for personal service [by the servant] has not been recognized . . . in [the United States] as involving a liability to criminal punishment, except in the cases of soldiers, sailors, and possibly some others, and public opinion would not tolerate a statute to that effect."¹

the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer."

The validity of this statute was again affirmed by the state court in *Short v. Bullion-Beck & C. Min. Co.* (1899) 20 Utah, 20, 45 L.R.A. 603, 57 Pac. 720.

¹*Robertson v. Baldwin* (1897) 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326. The actual question involved in the case was thus discussed: "Does the epithet 'involuntary' attach to the word 'servitude' continuously, and make illegal any service which becomes involuntary at any time during its existence; or does it attach only at the inception of the servitude, and characterize it as unlawful because unlawfully entered into? If the former be the true construction, then no one, not even a soldier, sailor, or apprentice, can surrender his liberty, even for a day; and the soldier may desert his regiment upon the eve of battle or the sailor may abandon his ship at any intermediate port or landing, or even in a storm at sea, provided only he can find means of escaping to another vessel. If the latter, then an individual, may, for a valuable consideration, contract for the surrender of his personal liberty for a definite time and for a recognized purpose, and subordinate his going and coming to the will of another during the continuance of the contract?—not that all such contracts would be

lawful, but that a servitude which was knowingly and willingly entered into could not be termed involuntary. Thus, if one should agree, for a yearly wage, to serve another in a particular capacity during his life, and never leave his estate without his consent, the contract might not be enforceable for the want of a legal remedy, or might be void upon grounds of public policy, but the servitude could not be properly termed involuntary. Such agreements, for a limited personal servitude at one time were very common in England, and by statute of June 17, 1823, 4 Geo. IV. chap. 34, § 3, it was enacted that if any servant in husbandry, or any artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, laborer, or other person should contract to serve another for a definite time, and should desert such service during the term of the contract, he was made liable to a criminal punishment. . . . The prohibition of slavery, in the 13th Amendment, is well known to have been adopted with reference to a state of affairs which had existed in certain states of the Union since the foundation of the government, while the addition of the words 'involuntary servitude' were said in the *Slaughterhouse Cases* (1872) 16 Wall. 36, 21 L. ed. 394, to have been intended to cover the system of Mexican peonage

One of the instances to which the concluding words of the qualifying clause in the statement may be supposed to have reference is indicated by the assertion made, *arguendo*, by a Federal judge, that "it is competent for legislation to make it a criminal offense for an employee, without giving reasonable notice, to suddenly quit duties the continued performance of which, for the time being, under the conditions of the particular calling, is necessary to prevent the endangering of life, health, or limb, or inflicting other grievous inconvenience and sacrifice upon the public."²

and the Chinese coolie trade, the practical operation of which might have been a revival of the institution of slavery under a different and less offensive name. It is clear, however, that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional; such as military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor children or wards. The amendment, however, makes no distinction between a public and a private service. To say that persons engaged in a public service are not within the amendment is to admit that there are exceptions to its general language, and the further question is at once presented, Where shall the line be drawn? We know of no better answer to make than to say that services which have, from time immemorial, been treated as exceptional, shall not be regarded as within its purview." In his dissenting opinion Judge Harlan said: "If it be said that government may make it a criminal offense, punishable by fine or imprisonment or both, for anyone to violate his private contract voluntarily made, or to refuse without sufficient reason to perform it,—a proposition which cannot, I think, be sustained at this day in this land of freedom,—it would by no means follow that government could, by force applied in advance of due conviction of some crime, compel a freeman to render personal services in respect of the private business of another."

In *People v. Orange County Road Constr. Co.* (1903) 175 N. Y. 84, 65 L.R.A. 33, 67 N. E. 129, Cullen, J., said that as the point was not involved

in the case before the court, he was not prepared either to assert or deny the correctness of the contention of counsel, that "the legislature can make the breach of a civil contract, solely as such, a criminal offense."

In *Haight v. Badgeley* (1853) 15 Barb. 499, it was observed by Hand, P. J., that in the state of New York there never had been, and probably never would be, criminal proceedings to enforce a contract for the personal services of an adult.

In *Bailey v. State* (1908) 158 Ala. 18, 48 So. 498, the court said: "It is clear that a mere breach of contract cannot be made the foundation for a criminal offense." But this broad statement is obviously incorrect, unless it is understood as being applicable merely to contracts of service.

² *Peonage Cases* (1903) 123 Fed. 671. The passage following this statement may also be quoted: "Surely a train despatcher, indicted for suddenly leaving the service without giving orders necessary to prevent the clash of opposing trains upon a railroad, could not successfully plead, when destruction of life and property were brought about by his sudden leaving, that he could not be punished, because he did no more than breach a contract of service. In these and like cases, the criminal law would be exerted not to compel performance, or to prevent quitting the service in a reasonable way, but because, by abandoning it in an unreasonable way, the employee has created a condition of affairs, the natural, direct, and known result of which is to endanger life, health, or limb, or to inflict grievous public injury. This act is not planned with any such purpose. It does not attempt to make the leaving of the service, which is private in its

2833. Enactments relating to the nonfraudulent abandonment of service by farm laborers after the receipt of advances.—The decisions are not harmonious in regard to the constitutionality of enactments which, without the insertion of any restrictive phraseology specifically limiting their purview to cases involving fraud, declare that a farm laborer, working for wages or shares, who repudiates his contract after having received advances or supplies on the faith of it, is guilty of a misdemeanor.¹ The several grounds upon which such enactments have been attacked are as follows:

(1) That they are repugnant to the 13th Amendment of the Federal Constitution by which involuntary servitude is abolished. By two of the inferior Federal courts it was held with respect to the Alabama and South Carolina Acts, that there is such a repugnancy.² More recently, in a case which did not call

obligation, an offense under any circumstances."

In *Adair v. United States* (1908) 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764, the court remarked: "It may be—but upon that point we express no opinion—that in the case of a labor contract between an employer engaged in interstate commerce and his employee, Congress could make it a crime for either party without sufficient or just excuse or notice to disregard the terms of such contract, or to refuse to perform it."

By § 673 of the New York Penal Code of 1882 it is provided that any person who breaks a contract of labor, having reasonable cause to believe that the probable consequence of doing so will be to endanger human life, cause grievous bodily injury, or expose valuable property to destruction, shall be guilty of a misdemeanor. Compare the corresponding provisions in the English conspiracy and protection of property act, quoted in § 319, *ante*.

¹The peculiar economic conditions which have led to the passage of these enactments in the Southern states is indicated by the following extract from the dissenting opinion of Jones, J., in *Ex parte Hollman* (1907) 79 S. C. 9, 21 L.R.A.(N.S.) 242, 60 S. E. 19, 14 Ann. Cas. 1105: "A very prevalent form of labor contract is the share system, in which the landowner furnishes land, stock, tools, seed, and fertilizers, in whole or in part, and the laborer undertakes to supply all the necessary

labor, for which he is to receive an agreed portion, frequently one half, of the crop. Or the contract may be for stipulated wages in money payable at the end of the month or year or at such time as may be agreed upon. When the busy work time on the farm arrives, the laborer is generally in debt to the landowner for advances secured on the faith that he will perform the stipulated work. It is then the dishonest laborer repudiates his obligation, and not only fraudulently deprives the owner of his property, but frequently brings disaster on the landowner's farming business. The frequency of such conduct and its evil influence on the farming industry called for some remedy. The utter futility of mere civil remedies against the average farm laborer, and the necessity for some remedy, no doubt prompted the act in question."

²In his charge to the grand jury in the *Peonage Cases* (1903) 123 Fed. 671, Jones, J., thus stated his reasons for pronouncing this objection to be fatal to the validity of the Alabama act of March 1, 1901, which provides that any person who having "contracted in writing to labor for or serve another for any given time, or any person who has by written contract leased or rented land from another for any specified time, or any person who has contracted in writing with the party furnishing the lands, or the land and teams, to cultivate it, either to furnish labor, or labor and teams, to cultivate the lands," shall afterwards, "without the consent

for a categorical ruling upon the point, the Federal Supreme Court used language which shows that it accepts this

of the other party and without sufficient excuse to be adjudged by the court, 'shall leave such other party or abandon said contract, or leave or abandon the leased premises or land as aforesaid,' and take employment of a similar nature from another person, without first giving notice of the prior contract," is guilty of a misdemeanor: "This statute practically attaints the debtor and makes him a legal pariah if he attempts to exercise his right to labor without another man's consent, and that man his creditor. One of the most valuable liberties of man is to work where he pleases, and to quit one employment and go to another, subject, of course, to civil liability for breach of contract obligations. These laws attempt to take his right away and destroy this liberty. When a man's liberties are taken from him because he does not pay a debt, and he is punished if he does not perform a civil contract, or 'abandons the leased premises,' the place where he agreed to do it, he is put in prison bounds, and is imprisoned for debt in the meaning of the Constitution. The statute, in effect, makes him a fixture to the place, because he owes a debt, and does not perform a contract in order to liquidate it. It is a fundamental principle of law that the legitimacy of the exercise of the police power, or any other legislative authority concerning the constitutional rights of the citizen, whatever the language employed in the statute, is to be tested and determined by its 'natural and reasonable effect' upon that right. It is a maxim alike of the law and common sense, that no power can be exercised indirectly which cannot lawfully be exercised directly. What is the 'natural and reasonable effect' of the penalty imposed upon the laborer or renter for not giving information as to his broken contract before engaging in service elsewhere, when measured by the legal and practical consequences which inevitably follow? The laborer or renter who once enters into a contract and breaches it, no matter how righteously, subjects himself during the whole term of the contract to risk of prosecution if he takes like employ-

ment with others without first informing the subsequent employer of the prior contract. The mere quitting of the contract, whether rightly or wrongly, clouds and impedes his right to work for others during the whole time the contract is to run. The law provides no means for determining the justice of his excuse, at any time, in any mode, in any tribunal, unless he first risks the penalty of hard labor by taking the new employment without informing the subsequent employer of the prior contract. This is not required of any other freeman in the land, or exacted of any other debtor. It is a penalty imposed for debt. The person from whom he seeks employment may desire the service of the laborer or renter, and for that matter believe he was justified in quitting the former service; yet, almost invariably, the would-be employer will be deterred from giving work to the laborer or renter, because, in that event, he would assume the peril of maintaining the justice of the laborer or renter's excuse, and, if he failed, of having to pay heavy fines and penalties. If, however, the debtor succeeds in convincing the new employer that he was justified in quitting, and so obtains employment, and the former employer insists that he was not, and notifies the new employer that he does not consent, the latter, in all probability, will dismiss the laborer or renter, rather than risk prosecution, under peril of heavy penalties, if he fails to show the laborer or renter had sufficient excuse for leaving. . . . The whole scheme and purpose, and the inevitable effect of these statutes, are to coerce the laborer or renter to pay a debt, return to a personal service, by stress of penal enactments leveled at his person in the one instance, and against his right to work in the other. No man can be lawfully compelled to disclose differences with former employers, or breaches of contract with others, as a condition precedent to the right lawfully to engage in the service of another, in order to coerce him to pay a debt or perform a contract of personal service. The debtor cannot be compelled to put himself upon the black

doctrine.⁸ That doctrine has also been applied in the most recent of

list that he may be prevented from getting work without an employer's consent, in order to coerce him to the performance of a contract of personal service or the payment of a debt. All such legislation is plainly violative of our state Constitution. . . . A person convicted and put to hard labor for violating the provisions of this statute, because he did not give notice of the first employment before entering upon the second, is restrained of his liberty in violation of the Constitution of the United States, and is entitled to discharge on habeas corpus, notwithstanding he is held under a final judgment of a state court which remains unappealed and unreversed. *Ex parte Royal* (1886) 117 U. S. 241, 29 L. ed. 868, 6 Sup. Ct. Rep. 734. The act is plainly violative of the 13th Amendment to the Constitution, and the statute passed, in pursuance thereof, against peonage. It establishes a system of peonage, and uses the arm of the law to keep persons in 'a condition of peonage,' whenever they 'abandon the leased premises,' by coercing performance of the 'obligation' of contracts of 'labor or service' by involuntary service."

In *Ex parte Drayton* (1907) 153 Fed. 986, the provision in the § 357 of the South Carolina Criminal Code 1902, to the effect that any laborer working for a share of a crop, or for wages, in money or other valuable consideration under a contract to labor on farm land, who shall receive advances either in money or supplies, and thereafter wilfully and without just cause fail to perform the reasonable services required of him by the terms of the contract, should be liable to prosecution for misdemeanor, and punished by imprisonment, etc., was invalid, as operating so as to subject a laborer who was guilty of the prohibited act to involuntary servitude. The court said: "Its whole purpose is to coerce the laborer to perform the service required of him by the terms of his contract under penalty of prosecution and imprisonment if he fails to work. It is a legislative judgment enforcing involuntary servitude. It does not imprison the laborer because he refuses to pay the debt or return

the advances, but because he does not continue in an involuntary servitude. Under the guise of police power, it compels one person to continue against his will to render personal services to another. If this act and others of cognate character are sustained, the state may by its criminal laws completely nullify and abrogate the main object of the amendment prohibiting slavery and involuntary servitude, and establish a complete system of peonage."

Compare also *Meyer v. Berlandi* (1888) 39 Minn. 438, 1 L.R.A. 777, 12 Am. St. Rep. 663, 40 N. W. 513, cited in § 2818, note 11, *ante*.

⁸ In *Bailey v. Alabama* (1911) 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145, where the actual question discussed was the validity of a provision declaring the abandonment of the contract to be presumptive evidence of fraud (see § 2834, *post*), the court thus explained the effect of the act of Congress which was passed for the enforcement of the 13th Amendment of the Federal Constitution: "The fact that the debtor contracted to perform the labor which is sought to be compelled does not withdraw the attempted enforcement from the condemnation of the statute. The full intent of the constitutional provision could be defeated with obvious facility if, through the guise of contracts under which advances had been made, debtors could be held to compulsory service. It is the compulsion of the service that the statute inhibits; for, when that occurs, the condition of servitude is created which would be not less involuntary because of the original agreement to work out the indebtedness. The contract exposes the debtor to liability for the loss due to the breach, but not to enforce labor. . . . The act of Congress nullifying all state laws by which it should be attempted to enforce the 'service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise,' necessarily embraces all legislation which seeks to compel the service or labor by making it a crime to refuse or fail to perform it. Such laws would furnish the readiest means of compulsion. The 13th Amendment prohibits involuntary servi-

the decisions rendered in South Carolina.⁴ But it has been rejected in Louisiana.⁵ The preponderance of authority, therefore, is distinctly in favor of the theory that enactments of this description are in conflict with the constitutional provision referred to above. As that

tude except as punishment for crime. But the exception, allowing full latitude for the enforcement of penal laws, does not destroy the prohibition. It does not permit slavery or involuntary servitude to be established or maintained through the operation of the criminal law, by making it a crime to refuse to submit to the one or to render the service which would constitute the other. The state may impose voluntary servitude as a punishment for crime, but it may not compel one man to labor for another in payment of a debt, by punishing him as a criminal if he does not perform the service or pay the debt."

⁴In *State v. Williams* (1899) 32 S. C. 123, 10 S. E. 876, the enactment in Gen. Stat. § 2084, by which a laborer under contract to labor on farm lands, who should receive advances and thereafter wilfully, and without just cause, fail to perform the reasonable service required by the contract, was declared to be guilty of a misdemeanor, was held constitutional. The standpoint of the court is indicated by the following remarks: "If the general assembly sees proper to make the violation of a particular species of civil contract a criminal offense, we are unable to discover in the provisions of the Constitution anything which forbids such legislation. No person is required to enter into such a contract unless he chooses to do so; and if he does so, he must take the consequences affixed by the law to the violation of a contract into which he has voluntarily entered, just as he subjects himself to the consequences of any other violation of the law. We are unable to discover any feature of 'involuntary servitude' in the matter. Everyone who undertakes to serve another in any capacity parts for a time with that absolute liberty which is claimed that the Constitution secures to all; but as he does this voluntarily, it cannot be properly said that he is deprived of any of his constitutional rights; and if he violates his undertaking, he thereby of his own accord subjects himself to such punish-

ment as the lawmaking power may have seen fit to impose for such violation." For the other points decided in this case, see notes 8, 10, *infra*.

But this decision was overruled in *Ex parte Hollman* (1908) 79 S. C. 9, 21 L.R.A.(N.S.) 242, 60 S. E. 19, 14 Ann. Cas. 1105. The court said: "It is important to observe our statute places no limit on the time for which a laborer may be bound under a contract to work, nor does it allow him to release himself from his burden to continue the service on pain of punishment as a criminal by repayment of the advances. The statute not only enforces the involuntary service of the laborer because he has contracted a debt with his employer, but it enforces his involuntary service because the debt once existed, though it be paid. Thus it falls within the prohibition of the peonage statute, and goes beyond it. It is no answer to say the laborer originally entered into the contract of service and contracted the debt voluntarily. The peonage statute is directed against maintaining as well as establishing involuntary servitude in liquidation of any debt or obligation. It is nothing in support of the statute now attacked that it enforces involuntary servitude on account of a debt by the compulsion of a statute providing for indictment and imprisonment for quitting such a service, rather than allowing the employer to compel it under a guard. In contemplation of law, the compulsion to such service by the fear of punishment under a criminal statute is more powerful than any guard which the employer could station." The court disapproved the Louisiana case cited in the following note.

⁵In *State v. Murray* (1906) 116 La. 655, 40 So. 930, 7 Ann. Cas. 957, a statute providing that whoever violates a contract of labor, upon the faith of which money or goods have been advanced, shall be punished by fine, or, in default of payment, by imprisonment, at the discretion of the district court, unless he shall have first tendered to the person with whom he entered into the labor

provision includes an exceptive clause with regard to imprisonment for crime, the theory thus adopted involves by implication the doctrine that the wrongful departure of a servant from his employment is not a crime in the sense which that word is intended to bear in the provision. Apparently such a limitation of the meaning of that word cannot be referred to any principle more solid than the somewhat vague conception that the inclusion of this particular breach of duty in the category of those which may be punished by the restraint of the defaulter's person is inconsistent with the political and social ideas of the community. In this point of view we seem to be led to the conclusion that, in adopting the theory under discussion, the courts have virtually taken the position that the literal connotation of the word "crime" may properly be circumscribed for the mere purpose of giving effect to those ideas. The difficulty of justifying such a position on purely juristic grounds is obvious, for it results in the narrowing of the *prima facie* signification of a constitutional clause by the application of an extrinsic criterion not suggested by the language of the clause itself. With considerations of public policy the present chapter is, of course, not concerned.

(2) That they are in conflict with the clauses of the state Constitutions which forbid imprisonment for debt, except where fraud is proved. Their invalidity has been predicated on this ground by one of the inferior Federal courts,⁶ by the supreme courts of North

contract and from whom money or goods was obtained, the amount of money or the value of the goods obtained, was upheld on grounds thus stated: "But the defendant assumes that he has been subjected to involuntary servitude, and that, in consequence, he is entitled to relief. He is not in a position to maintain any such contention, as we understand from the indictment. He wilfully obtained a small amount from his employer on the day of his employment, and on the same day left. The indictment conveys the idea that he left without voluntary or involuntary servitude. He has not been wronged in any way. The wrongdoing is his, and not his employer's. If the question were before us of an attempt on the part of the employer, because of his laborer's indebtedness, to compel him to continue to perform his daily task, the result would, in all probability, be different. But here no such question presents itself. There could not have been the least coercion by the master or employer to compel the

continuance of the work. The laborer became the debtor wilfully in order to obtain a small amount without performing any labor whatever. The employer did not deprive him of his liberty, but he deprived his employer of his property. He went off with that which was not his, and for which he did not labor, and now his contention is that the statute is unconstitutional, and in its unconstitutionality does not reach even such an act of bad faith as that which he has committed. There can be no law which prohibits the condemnation of such acts. If no man has a right to keep another in involuntary servitude, no man by false words has the right to obtain the property of another and keep it as his own." The flaw in this reasoning is sufficiently obvious. The "involuntary servitude" to which the statute leads manifestly does not begin until the defaulting servant is imprisoned in default of payment.

⁶ *Peonage Cases* (1903) 123 Fed. 671 (Alabama act of March 1, 1901).

Carolina and Georgia,⁷ and, in its latest ruling on the point, by the supreme court of South Carolina.⁸

⁷ *State v. Williams* (1909) 150 N. C. 802, 63 S. E. 949 (explicit ruling); *Banks v. State* (1905) 124 Ga. 15, 2 L.R.A.(N.S.) 1007, 52 S. E. 74 (*arguendo*); *Lamar v. Prosser* (1904) 121 Ga. 153, 48 S. E. 977 (*arguendo*); *Vance v. State* (1907) 128 Ga. 661, 57 S. E. 889 (*arguendo*).

⁸ In *State v. Williams* (1889) 32 S. C. 123, 583 (memo.) 10 S. E. 876, 551, one of the contentions rejected was that the act referred to in note 4, *supra*, was invalid as providing for imprisonment for debt.

In *State v. Chapman* (1899) 56 S. C. 420, 76 Am. St. Rep. 557, 34 S. E. 961, where the statute was sustained against the charge that it was discriminatory in favor of the landlord and against the laborer (see note 11, *infra*), no reference is made to the question of imprisonment for debt.

In *State v. Easterlin* (1901) 61 S. C. 71, 39 S. E. 250, the statute was held not to provide imprisonment for debt, the court observing that "even if it could be so construed, the offense made punishable involves an element of fraud."

These decisions were overruled in *Ex parte Hollman* (1908) 79 S. C. 9, 21 L.R.A.(N.S.) 242, 60 S. E. 19, 14 Ann. Cas. 1105. The court said: "We cannot avoid the conclusion that the statute in question provides for imprisonment for debt without proof of fraud, and therefore attempts to deprive the citizen of one of the personal rights guaranteed by the Constitution of the state. The mere receipt of money or supplies advanced by the employer cannot make the laborer anything more than a debtor to the employer; and without doubt the repayment of the money or the value of the supplies advanced puts an end to the legal obligation and the relation of debtor and creditor. The statute does not go to the extent of requiring the laborer to pay the advances in labor, and therefore there is nothing to prevent his discharge of the debt for advances in the same manner as other debts are discharged. It is equally clear that the service due by the laborer under the contract is also a debt within the meaning of the Constitution. Debt is that which is due from one person to another,

whether money, goods, or services, and whether payable at present or at a future time. Century Dict. 13 Cyc. 399, and authorities cited. The term 'debt,' within the meaning of the Constitution, is usually held to embrace obligations arising out of contract and to exclude liability for tort and for fines imposed for crime. *Carr v. State*, 34 L.R.A. 634, note; *State v. Brewer* (1893) 38 S. C. 263, 19 L.R.A. 362, 37 Am. St. Rep. 760, 16 S. E. 1001. Therefore, beyond dispute, the laborer referred to in the statute falls under the terms of the Constitution as a person who, by his contract, incurs a debt for advances received by him, and for labor which he promises to perform. . . . The vital question then is whether the statute contemplates conviction only for fraudulent breach of the contract,—fraudulent failure to pay the debt of service. This inquiry depends upon whether one who shall 'wilfully, and without just cause, fail to perform the reasonable service required of him by the terms of the said contract,' is necessarily guilty of fraud, for if not, then a laborer may be convicted and imprisoned for debt under the statute without proof of fraud. It is not wilful nor intentional injustice the statute makes criminal, but wilful and unjust failure to carry out a contract. This distinction is vital. Clearly a laborer may wilfully refuse to perform the service required, his refusal may be unjust and the service required may be reasonable,—that is, such as he contracted to give,—and yet his action be free from fraud and taken with the utmost good faith, in the sincere belief that his refusal was just and the service required unreasonable under the terms of the contract. Yet, however completely he may show his good faith, and however fully the court and jury may be convinced of his good faith, conviction must follow unless the jury think he had just cause to abandon the contract or that the service required was not reasonable." The court disapproved *Ex parte Clark* (1846) 20 N. J. L. 648, 45 Am. Dec. 394, in which a statute was held constitutional which provided for imprisonment for one who "unjustly and unlawfully" refused to apply his property to the payment of his debts.

(3) That they contravene the equality clauses of the Federal and state Constitutions. By two of the inferior Federal courts this objection has been treated as being fatal to the validity of the Alabama act and the later South Carolina act.⁹ The earlier South Carolina act was also annulled on the same ground by the supreme court of that state.¹⁰ The act, in its amended form, was at first held to be valid,¹¹ but more recently the objection that it denies the equal protection of the laws has been sustained.¹²

⁹ In the *Peonage Cases* (1903) 123 Fed. 671, Jones, J., thus criticized the Alabama act referred to in note 2, *supra*: "Its criminal penalties are grafted only upon contracts between laborers and renters on farm lands, and their hirers or landlords. It is designed solely in the interest of the employer or landlord. The latter may discharge the laborer or renter, or fail to come up to promises to him, without sufficient excuse; yet this legislation gives the renter or laborer no unusual recourse against his employer or landlord, while, in effect, though not in name, it pronounces practical outlawry, in favor of the landlord, against laborers or renters regarding their right to labor and pursue their accustomed vocations, by attaching special and extraordinary penalties to their breaches of contracts with landlords and employers. . . . Legislative power cannot arbitrarily single out particular classes of persons and put burdens upon them, bottomed upon breaches of their contracts, to prevent their working elsewhere, which are not enforced against other classes or persons, similarly circumstanced, who break like contracts. The lessee of premises in a city, or in the country, so long as the agreement does not relate to the making of a crop, and the laborer in the mine, factory, or forest, the servant in the household, the employee upon the railroad, the clerk, the mechanic, and the professional man, may each break their contracts to render service to a particular employer, without sufficient excuse, and afterwards make similar contracts, at will, with others, without first having to inform of their prior contract, or incurring the almost certain risk of being debarred thereby of the opportunity or rewards of new employment if they do. The landlord, the farmer, and every other person in Alabama, save the renter to make a crop and the laborer, may

break a contract to labor or to do other service for others, without just excuse, and yet the arm of the state does not reach out, on that account, with criminal penalties to prevent his retrieving his fortunes in other like employment, or put him in peril of hard labor if he mistakes the justifiableness of his excuse in leaving, and, in reliance upon it, impelled by necessity to obtain work from which he will be debarred if he informs of it, conceals the first contract rather than remain in idleness and want. The laborer and land renter alone are made inferior in right, in the vital matter of earning a livelihood and the pursuit of their usual vocations, to all other citizens in the state, and subjected to burdens, inequalities, and pains from which all other citizens who may have unjustifiably broken contracts of personal service are entirely free."

A similar doctrine was adopted in *Ex parte Drayton* (1907) 153 Fed. 986.

¹⁰ In *State v. Williams* (1889) 32 S. C. 123, 583 (memo.), 10 S. E. 876, 551, the act of 1867 was held to be unduly discriminative, in that the punishment which might be imposed under it was fixed in respect of the landholder, but not in respect of the laborer.

¹¹ In *State v. Chapman* (1897) 56 S. C. 420, 76 Am. St. Rep. 557, 34 S. E. 961, the court thus stated its position: "From the language of this act, it will be seen that the offense denounced is not merely the violation of a contract by a laborer employed to work on the lands of another, but the offense consists in receiving advances either in money or supplies, and thereafter wilfully and without just cause failing to perform the reasonable service required of him by the terms of the contract. It is apparent, therefore, that this case differs widely from the case of *State v. Williams* (1889) 32 S. C. 123, 10 S. E. 876. . . . The offense for which the

(4) That they unwarrantably restrict the right of contract. This contention has prevailed in the case of the Alabama act.¹³

2834. Enactments relating to the fraudulent abandonment of service after the receipt of advance.—Enactments imposing a criminal liability upon laborers to whom fraud is imputable in respect of the acceptance or abandonment of their employment, after they have received advances or supplies on faith of the contract, have been upheld against the following objections:

(1) That their effect is to subject defaulting laborers to involuntary servitude.¹

appellant has been convicted would not be complete if the laborer, before receiving advances in money or supplies, had wilfully and without just cause failed to perform the reasonable service required of him by the terms of the contract. . . . It is clear, therefore, that there is no discriminating feature in the act of 1897, and we do not see how there could be one, inasmuch as laborers never make advances, either in money or supplies, to landholders. If the laborer, before receiving advances in money or supplies, should violate the terms of his contract in the grossest manner, he could not be indicted under the act of 1897, but could only be prosecuted under the provisions of § 2084 of the General Statutes of 1882, as amended by the act of 1889, 20 Stat. 381, passed for the purpose of eliminating the constitutional objection in the section as it was originally enacted; and so the landholder, if he violated any of the terms of the contract, could only be prosecuted under the very same law, and subject to the very same punishment, as that provided for the laborer under similar circumstances." The validity of this statute was taken for granted in the later case, *State v. Easterlin* (1901) 61 S. C. 71, 39 S. E. 250.

¹² *Ex parte Hollman* (1908) 79 S. C. 9, 21 L.R.A. (N.S.) 242, 60 S. E. 19, 14 Ann. Cas. 1105.

¹³ In *Toney v. State* (1904) 141 Ala. 120, 67 L.R.A. 286, 109 Am. St. Rep. 23, 37 So. 332, 3 Ann. Cas. 319 (act of March 1, 1901), the *ratio decidendi* was that the act was repugnant to the clause in the state constitution, which provides that the protection of the citizen in the enjoyment of life, liberty, and property is the sole object of government, and also contravened the "due process" clause

of the 14th Amendment of the Federal Constitution. With reference to the conditions under which the statute authorized an abandonment of the contract, the court remarked: "The first of these, the employer in the case of the employee, or the landlord in the case of the renter, could, by withholding his consent, render unavailable; the second—the existence of an excuse for the abandonment, to be judged by the court—could never be known to be available except at the risk of, and at the end of, a criminal prosecution; the third—that of giving notice of the existing contract—would tend to prevent the making of a similar contract with a new employer or landlord, and this for reasons which are obvious, if regard be had to the risk of prosecution to which such new employer or landlord would be subject under another act *in pari materia* with this, and approved on the day before the approval of this act. Acts 1900–1901, p. 1215. If the conditions prescribed by this act can be validly imposed, the door is open for the imposition of others more onerous. 'Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed.'—*Brown v. Maryland* (1827) 12 Wheat. 419, 6 L. ed. 678."

¹ Code 1896, § 4730, as amended by Gen. Acts 1903, p. 345, and Gen. Acts 1907, p. 636, providing an employee who, with intent to defraud, contracts in writing to perform services and receive money or property, and without refunding the same fails to perform such services, shall be punished as for larceny, is not repugnant to Bill of Rights 1901, § 20, declaring that no

(2) That they contravene the provisions of state Constitutions which forbid imprisonment for debt except in cases where fraud is proved. It is fully settled that "if the laborer contracts such a debt fraudulently, or fraudulently avoids the discharge of it, he falls without the protection of the Constitution."² The rationale of this doctrine is that the object of these statutes is to punish the laborers, not "for failure to comply with the obligation, but for the fraudulent intent with which the money was procured."³

person shall be imprisoned for debt. *Bailey v. State* (1909) 158 Ala. 18, 48 So. 498 (judgment affirmed in [1908] 211 U. S. 452, 53 L. ed. 278, 29 Sup. Ct. Rep. 141. But question of constitutionality not discussed); *Townsend v. State* (1905) 124 Ga. 69, 52 S. E. 293; *Latson v. Wells* (1911) 136 Ga. 681, 71 S. E. 1052.

² *Ex parte Hollman* (1907) 79 S. C. 9, 14, 21 L.R.A.(N.S.) 242, 60 S. E. 19, 14 Ann. Cas. 1105; *Banks v. State* (1905) 124 Ga. 15, 2 L.R.A.(N.S.) 1007, 52 S. E. 74; *Lamar v. Prosser* (1904) 121 Ga. 153, 48 S. E. 977; *Latson v. Wells* (1911) 136 Ga. 681, 71 S. E. 1052 (*arguendo*), and the cases cited in the following notes.

³ *Lamar v. State* (1904) 120 Ga. 312, 47 S. E. 958, affirming the constitutionality of a statute which provides "that if any person shall contract with another to perform for him services of any kind, with intent to procure money or other thing of value thereby, and not perform the service contracted for, to the loss and damage of the hirer, or, after having so contracted, shall procure money or other thing of value from the hirer, with intent not to perform the service to the loss and damage of the hirer, he shall be deemed a common cheat and swindler, and shall be punished as for a misdemeanor."

In *State v. Lann* (1907) 150 Ala. 66, 43 So. 357, 14 Ann. Cas. 1058, it was argued that the enactment in the Alabama Code 1896, § 4730, which provides that "any person who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act of service, and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses or fails to perform such act or

service, must on conviction be punished as if he had stolen it," is invalid because the defense is made dependent upon a failure by the accused to refund the money or pay for the property obtained, and that this fact indicates an intention to punish for debt, and not for fraud. But the court said: "While the statute purges the offense if the money is repaid, it does not convert the intent on the part of the legislature into seeking imprisonment for debt, rather than preventing and punishing fraud. The statute could be a valid one for the punishment of fraud with this requirement or proviso omitted. Therefore if our lawmakers required the state to go further in order to make out an offense, this is only beneficial to the accused, and does not render the statute unconstitutional. He cannot be convicted without fraudulent intent, whether he does or does not repay the money. The gist of the crime is to fraudulently get the money or property of another, and the statute merely condones the offense by permitting the defendant to repay or refund, and requires the state to negative this fact."

The doctrine laid down in the above case was again affirmed in *Bailey v. State* (1908) 158 Ala. 18, 48 So. 498, where the court said: "While it is clear that a mere breach of contract cannot be made the foundation for a criminal offense, and that undue restrictions cannot be placed on the right of an individual to enter into contracts, yet when the individual enters into a contract, with the intention to perpetrate a fraud, it is equally obvious that he passes over the constitutional boundary line in respect to the free right to contract; and it is within legislative competency to enact a law penalizing the entering into a contract with such intent, and obtaining money or other personal property through such agency.

(3) That they are in conflict with the "equality clauses" of the Federal and state Constitutions.⁴

This is all that is effectuated by the legislation in question. On its face the purpose is to punish fraudulent practices, not the mere failure to pay a debt. Thus considered, it is constitutional." On the appeal taken by the Federal Supreme Court (1908) 211 U. S. 452, 53 L. ed. 278, 29 Sup. Ct. Rep. 141, no constitutional question was decided. *Bailey v. State* (1907) 161 Ala. 75, 49 So. 886 (judgment was reversed by the Federal Supreme Court, but not on this point.—See next section, note 1).

In *State v. Norman* (1892) 110 N. C. 484, 14 S. E. 968, the validity of a statute which made it a criminal offense for any person, "with intent to cheat or defraud another," to obtain advances by color of any promise to commence work or labor, and then "unlawfully and wilfully fail to commence and complete said work according to contract without a lawful excuse," was affirmed on the ground that it required proof that advances were obtained with intent to cheat and defraud.

⁴In the *Peonage Cases* (1903) 123 Fed. 671, the enactment in the Alabama Code 1896, § 4730, which provides that "any person entering into a written contract for the performance of any acts or service, with the intent to injure or defraud his employer, and thereby obtains money or personal property from such employer, and with like intent and without just cause, and without refunding the money or paying for such property, refuses to perform such act or service, must, on conviction, be punished as if he had stolen it," was thus referred to: "It applies to all classes of persons who commit the designated offense, and does not single out any particular class. This statute is constitutional. Persons duly convicted of violating its provisions, and put to labor in consequence, are lawfully undergoing involuntary servitude. On these lines, legislation cannot move at all, when the act complained of is not a crime, but a mere breach of the obligations of a contract. The 'great, general, and essential principles' of government cannot be bent or swayed to the prejudice of renters or laborers, who are freeman and citizens, in order to

improve the efficiency of our system of labor, or to avert the disastrous consequences to landlords and farmers which result in every other business in life when the obligations of contracts are not performed or respected. The gap once made by discrimination against laborers and renters, no other class of men would be safe from like discrimination."

That the enactment does not deny the equal protection of the laws was held in *Bailey v. State* (1909) 161 Ala. 75, 49 So. 886 (judgment was reversed by the Federal court, but not on this point. See next section, note 1).

In *Vance v. State* (1907) 128 Ga. 661, 57 S. E. 889, it was argued that the equal protection of the laws is denied by the Georgia act of 1903, in that it subjects the laborer in certain contingencies to prosecution and punishment, and at the same time affords the employer absolute immunity from prosecution or punishment on account of any infraction of the obligations of the contract. But the court said: "In the nature of things the master does not ordinarily procure advances from his servant, or the employer from his employee. Legitimate classification is not unjust discrimination. There are a very large number of laws upon the statute books imposing penalties upon certain persons without also providing for penalties as to others, though having some relation with them. . . . It is further urged that the equal protection of the law is denied because the person contracted with, and for whom services are to be rendered, is permitted to testify to a state of facts declared to be sufficient to carry the presumption of fraudulent intent, whereas the accused is not permitted to testify, and has no opportunity or means equal to those afforded to the person contracted with, of proving that no fraudulent intent existed; and the act lays down no measure of proof by which such presumption may be overcome. Here, again, the error is made of treating the act as punishing a breach of contract, instead of a fraudulent transaction. To say that the equal protection of the law is denied because a prosecutor can testify and the person

2835. Enactments declaring abandonment to be evidence of fraud.—

It has been held by the Supreme Court of the United States that the clause of the Federal Constitution which abolishes involuntary servitude is violated by an enactment of the type discussed in the preceding section, in so far as it provides that the refusal or failure to perform the service contracted for, or to refund the money obtained, without just cause, shall be *prima facie* evidence of the intent to injure or defraud.¹ This ruling has destroyed the authority of some earlier cases

accused of crime cannot would upset the practice in criminal procedure for centuries past. The privilege to the accused to testify as a witness is conferred by statute in some states. It is not a common-law right. In this state it does not exist generally, but only in certain cases."

It was also held that the statute is not in conflict with the clause of the state Constitution, which declares that laws of a general nature shall have uniform operation throughout the state. The court said that it applies uniformly to all persons within the given class. The doctrine laid down by the Supreme Court was applied by the court of appeals in *Vance v. State* (1907) 2 Ga. App. 420, 58 S. E. 690.

¹*Bailey v. Alabama* (1911) 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145, reversing (1909) 161 Ala. 75, 49 So. 886. The provision in question was an amending clause, added to the Alabama statute in 1903, and enlarged in 1907. The court said: "The refusal or failure to perform the service, without just cause, constitutes the breach of the contract. The justice of the grounds of refusal or failure must, of course, be determined by the contractual obligation assumed. Whatever the reason for leaving the service, if judged by terms of the contract, it is insufficient in law, it is not 'just cause.' The money received and repayable, nothing more being shown, constitutes a mere debt. The asserted difficulty of proving the intent to injure or defraud is thus made the occasion for dispensing with such proof, so far as the *prima facie* case is concerned. And the mere breach of a contract for personal service, coupled with the mere failure to pay a debt which was to be liquidated in the course of such service, is made sufficient to warrant a conviction. . . . We are not impressed with the argument

that the supreme court of Alabama has construed the amendment to mean that the jury is not controlled by the presumption, if un rebutted, and still may find the accused not guilty. . . . The controlling construction of the statute is the affirmation of this judgment of conviction. It is not sufficient to declare that the statute does not make it the duty of the jury to convict, where there is no other evidence but the breach of the contract and the failure to pay the debt. The point is that, in such a case, the statute authorizes the jury to convict. It is not enough to say that the jury may not accept that evidence as alone sufficient; for the jury may accept it, and they have the express warrant of the statute to accept it as a basis for their verdict. And it is in this light that the validity of the statute must be determined. It is urged that the time and circumstances of the departure from service may be such as to raise not only an inference, but a strong inference, of fraudulent intent. There was no need to create a statutory presumption, and it was not created for such a case. Where circumstances are shown permitting a fair inference of fraudulent purpose, the case falls within the rule of *Ex parte Riley* (1891) 94 Ala. 82, 10 So. 528, which governed prosecutions under the statute before the amendment was made. The 'difficulty,' which admittedly the amendment was intended to surmount, did not exist where natural inferences sufficed. Plainly the object of the statute was to hit cases which were destitute of such inferences, and to provide that the mere breach of the contract and the mere failure to pay the debt might do duty in their absence. . . . We cannot escape the conclusion that, although the statute in terms is to punish fraud, still its natural and inevitable effect is to expose to conviction for crime those who

in which state courts had affirmed the validity of provisions of this tenor. The ground upon which most of those cases proceeded was simply that such a provision is within the scope of the legislative

simply fail or refuse to perform contracts for personal service in liquidation of a debt, and, judging its purpose by its effect, that it seeks in this way to provide the means of compulsion through which performance of such service may be secured. The question is whether such a statute is constitutional." The following statement from the opinion in *Mobile, J. & K. C. R. Co. v. Turnipseed* (1910) 219 U. S. 35, 55 L. ed. 78, 32 L.R.A.(N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912A 463, was then quoted as the most recent enunciation of the principles which control the question: "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed. If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him." The court then proceeded as follows: "In this class of cases, where the entire subject-matter of the legislation is otherwise within state control, the question has been whether the prescribed rule of evidence interferes with the guaranteed equality before the law, or violates those fundamental rights and immutable principles of justice which are embraced within the conception of due process of law. But where the conduct or fact, the existence of which is made the basis of the statutory presumption, itself falls within the scope of a provision of the Federal Constitution, a further question arises. It is

apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions. And the state may not in this way interfere with matters withdrawn from its authority by the Federal Constitution, or subject an accused to conviction for conduct which it is powerless to prescribe. . . . What the state may not do directly it may not do indirectly. If it cannot punish the servant as a criminal for the mere failure or refusal to serve without paying his debt, it is not permitted to accomplish the same result by creating a statutory presumption which, upon proof of no other fact, exposes him to conviction and punishment. Without imputing any actual motive to oppress, we must consider the natural operation of the statute here in question (*Henderson v. New York* (*Henderson v. Wickham*) [1875] 92 U. S. 268, 23 L. ed. 547), and it is apparent that it furnishes a convenient instrument for the coercion which the Constitution and the act of Congress forbid,—an instrument of compulsion peculiarly effective as against the poor and the ignorant, its most likely victims."

The above case was followed in *State v. Griffin* (1911) 154 N. C. 611, 70 S. E. 292.

In *Latson v. Wells* (1911) 136 Ga. 681, 71 S. E. 1052, where the decision of the Federal Supreme Court was cited, the points actually determined are thus stated in the syllabus written by the court: (1) "The main legislative intent and purpose being to make the acts referred to in the first section a crime, and to provide for its punishments, the second section, simply providing that proof of specified acts 'shall be deemed presumptive evidence of the intent referred to,' is not essential to the carrying out of such legislative intent and purpose. This rule of evidence, if eliminated from the act, would not affect the main legislative scheme and purpose; and if the second section of the act is unconstitutional,

power,² and that they were not in conflict with certain clauses in the Constitution of the states in question.³ But in one instance the court relied upon the theory that the statutory declaration, although in terms absolute, should, for the purpose of sustaining it, be construed in the restricted sense which is indicated by the operation of the ordinary rule of criminal procedure that the jury is bound to acquit the accused unless it is satisfied, upon a consideration of the whole evidence, that he is guilty of fraud.⁴

the whole act would not be void, and the provisions of the first section would be constitutional and valid." (2) "Where one pleads guilty to accusations in a city court charging him with violating the first section of the act (embodied in the Penal Code 1910, § 715, above quoted), he cannot subsequently be released from custody, even if the provisions of the second section of the act (embodied in Penal Code 1910, § 716) are unconstitutional, the rule of evidence prescribed in the latter section not having been used against him."

² In *State v. Thomas* (1906) 144 Ala. 77, 80, 2 L.R.A. (N.S.) 1011, 113 Am. St. Rep. 17, 40 So. 271, 6 Ann. Cas. 744, the court relied upon the following statement of doctrine in *State v. Beach* (1897) 147 Ind. 74, 36 L.R.A. 179, 143 N. E. 949, where the court in sustaining a statute by which it was declared to be prima facie evidence of a banker's intent to defraud in receiving a deposit, if his failure, suspension, or involuntary liquidation occurs within thirty days thereof, said: "We think it clear that the legislature has the power to prescribe rules of evidence and methods of proof. A law which would in effect exclude the evidence of a party, and thereby deny him the right to be heard, would deprive him of due process of law. A law which provides that certain facts are conclusive proof of guilt would be unconstitutional, as would one which makes an act prima facie evidence of crime which has no relation to a criminal act, and no tendency whatever to establish a criminal act. If, however, the legislature, in prescribing the rules of evidence in any class of cases, leaves a party a fair opportunity to establish his case of defense, and give in evidence to the court or jury all the facts legitimately bearing on the issues in the cause to be considered and weighed by the tribunal

trying the same, such acts of the legislature are not unconstitutional. It has been repeatedly held that the legislature has the right to declare what shall be presumptive or prima facie evidence of any fact." This decision was followed in *State v. Vann* (1907) 150 Ala. 66, 43 So. 357, 14 Ann. Cas. 1058; *Bailey v. State* (1908) 158 Ala. 18, 48 So. 498 (question of constitutionality not discussed in the appeal reported in [1908] 211 U. S. 452, 53 L. ed. 278, 29 Sup. Ct. Rep. 141).

³ In *Banks v. State* (1905) 124 Ga. 15, 2 L.R.A. (N.S.) 1007, 52 S. E. 74. The court in answer to the contention that the provision in the Georgia act was repugnant to the clause of the state Constitution which declares that the legislative, judicial, and executive powers shall forever remain separate and distinct, said: "This is not an assumption of judicial functions by the legislature. It declares a rule of evidence under which certain acts are deemed presumptive evidence of a fraudulent intent in committing them. The legislature has power to establish rules of evidence."

In *Vance v. State* (1907) 128 Ga. 661, 57 S. E. 889, it held that this provision was not in conflict with another clause of the state Constitution which guarantees a public and speedy trial by an impartial jury.

⁴ *Mulkey v. State* (1907) 1 Ga. App. 521, 57 S. E. 1022. After referring to the earlier Georgia cases, the court continued thus: "It is therefore absolutely necessary, in order to sustain the statute at all, that its terms be construed as merely affording punishment for the fraud actually committed, and not as making breaches of contract criminal. Although, as is shown by Justice Lumpkin, in the *Banks Case* [note 3, *supra*] it is competent for the general assembly to prescribe a rule of

E. ENACTMENTS RELATING TO WOMEN.

2836. Enactments regulating the hours of work for women.—

a. Colorado.—In a case which involved the validity of a general enactment restricting the hours of work in mines and smelters, the supreme court disapproved, *arguendo*, the Massachusetts decision, cited in subsec. *c*, *post*.² In a later case it was held that, whether the question was determined with reference to the general police power that resides in the state legislature, or with reference to the amendment to the state Constitution (art. 5, § 25a), which requires the legislature to provide for an eight-hour day for persons employed in mining, etc., “or other branch of industry or labor,” that it may “consider injurious or dangerous to health, life, or limb,” an enact-

evidence, as has been done in the second section of the act in question, yet the lawmaking power can no more effectuate an unconstitutional result indirectly, through rules of evidence, than it can through direct substantive enactment. Therefore this section of the act, as well as the other, must be so construed as to limit its application to the perfectly legitimate purpose stated in the title of the act, the punishment of fraud; and as not to extend it to rendering punishable breaches of contract, or the failure to pay debts, where the contemplated fraud did not in fact exist at the time the money was obtained. The legislature has not made, nor did it have the power to make, the circumstances enumerated in this section of the act conclusive evidence of the fraud, and therefore (in case the other necessary elements of the offense are supplied), of guilt. Under the rule of evidence therein announced, the only effect to be given to the circumstances enumerated is to create a presumption; nor does the new rule alter in the slightest the time-honored doctrine that the evidence as a whole must be such as to establish the defendant's guilt beyond a reasonable doubt. The issue for the decision of the jury is not merely whether the proof has supplied the necessary elements to raise the presumption, but also whether, in view of all the evidence, the presumption is, beyond a reasonable doubt, well founded.

“If a statutory rule of evidence is, by reason of its generality, capable of

being applied by the courts to instances wherein such application would effectuate results forbidden by constitutional law, the courts must refuse to extend its application that far. See, in this connection, *Cooley*, Const. Lim. 452, 453. Such forbidden application of a rule of evidence arises when, under such a rule, the court allows the proof of acts which are not themselves criminal, and which the legislature has not the power to make criminal, to create the presumption that the defendant is guilty of another act, which is criminal, but which the acts necessary under the rule of evidence in question cannot, under the circumstances, reasonably tend to establish.”

² *Re Morgan* (1899) 26 Colo. 415, 47 L.R.A. 52, 60, 77 Am. St. Rep. 269, 58 Pac. 1071. The court thus criticized the reasoning in the passage quoted in note 8, *infra*: “The disposition made of the case evades the real question. To one who desires to devote her entire time and energies in laboring at one particular occupation, in which the legislature seeks to restrict her, it is no answer to say that her right to make contracts for her labor is not curtailed because she may work as many additional hours as she pleases at some other occupation. The value of the right consists in freedom to labor in any lawful business she may select, for as many hours each day as she chooses. This case is the only authority cited in some of the text-books for legislation of this character, but we cannot follow it.”

ment which prohibited the employment of women for more than eight hours a day in any mill, factory, manufacturing establishment, or store, must be pronounced invalid in respect of laundries. The *ratio decidendi* was that the legislature had not in this act, or elsewhere, declared the laundry business an occupation, or labor therein, injurious or dangerous to health, life, or limb, and that such a declaration was an essential condition precedent to the validity of an enactment of this character.³

b. Illinois.—A statute providing that no female should be employed in any factory or workshop more than eight hours in any one day was held invalid on two grounds; *viz.*, (1) that it discrimi-

³ *Burcher v. People* (1907) 41 Colo. 495, 124 Am. St. Rep. 143, 93 Pac. 14. The court said: "If the power to enact such legislation as this reposes in the amendment, or is inherently a part of the general legislative power belonging to the general assembly, it is entirely clear that the power itself must be exercised, in the first instance, by that law-making body. . . . It is unquestionably true, and cannot be, and is not, controverted, that the legislative branch of government alone has the authority, and is charged with the duty, of enacting such regulations, and cannot relinquish or delegate it to either of the other great co-ordinate departments of government. . . . The amendment recognizes this doctrine when, after specifying particular occupations in which the period of employment is prescribed, it adds, 'or other branch of industry or labor that the general assembly may consider injurious or dangerous to health, life, or limb.' Here we have, as to unnamed branches of industry and labor, the express limitation that regulations concerning hours of employment in them must be restricted to those which the general assembly may consider injurious or dangerous to health, life, or limb. We look in vain to find that the general assembly in § 3, or in any part of this or any other act, has considered or declared the laundry business, or even labor therein of any kind, either injurious or dangerous. The mere general prohibition of employment in harmless occupations beyond or in excess of specified hours is not the equivalent of a solemn finding and declaration of the general assembly that such occupations are injurious or

dangerous. The amendment contemplates that not until after the general assembly has considered and enacted that they are of that character can regulations of employment therein, and prohibition of labor beyond a certain time, be made effective, or violations thereof punished as a crime or misdemeanor. . . . It must be borne in mind, as the attorney general must concede, that under our Constitution the right of contracting for one's labor is reserved and guaranteed to every citizen. It is subject to no restraint except where the public safety, health, peace, morals, or general welfare demands it, and then only where the legislative department of the state government, in the exercise of its police power, selects a proper subject for its exercise and prescribes reasonable and appropriate regulations. In the absence, therefore, of a legitimate exercise by the general assembly of this power by a declaration to the contrary, the defendants might lawfully by contract require a woman to work more than eight hours per day in their laundry. Yet here is an attempted relinquishment by the law-making body of that very power of legislation, and a futile effort to confer upon the courts the authority to make such laws, by saying, in their discretion and in the first instance, and with no previous declaration on the subject by the general assembly, what occupations are unhealthful and dangerous. This is a palpable evasion of duty, coupled with an abortive attempt to give to the courts legislative power to make crimes and misdemeanors out of acts which are not in violation of any valid legislative enactment."

nated against employers and employees in the particular occupation specified, and (2) that it was "a purely arbitrary restriction upon the fundamental right of the citizen to control his or her own time and faculties," and "substituted the judgment of the legislature for the judgment of the employer and employee in a matter about which they are competent to agree with each other."⁴ It was urged by

⁴ *Ritchie v. People* (1895) 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454 (Laws 1893, p. 99, § 5). The direction in this statute that no female should be employed more than eight hours in one day was construed as importing a direction that no female should be under contract work for more than that number of hours, and consequently as limiting and restricting the right of the manufacturer and his employee to contract with each other in reference to the hours of labor. With regard to the first of the reasons assigned the court, after summarizing the effect of several earlier cases, stated its position as follows: "The legislature has no right to deprive one class of persons of privileges allowed to other persons under like conditions. The man who is forbidden to acquire and enjoy property in the same manner in which the rest of the community is permitted to acquire and enjoy it is deprived of liberty in particulars of primary importance to his pursuit of happiness. If one man is denied the right to contract as he has hitherto done under the law, and as others are still allowed to do by the law, he is deprived of both liberty and property to the extent to which he is thus deprived of such right. In line with these principles, it has been held that it is not competent, under the Constitution, for the legislature to single out owners and employers of a particular class, and provide that they shall bear burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which other owners or employers are permitted to make. *Millett v. People* (1886) 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Frorer v. People* (1892) 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395; *Ramsey v. People* (1892) 142 Ill. 380, 17 L.R.A. 853, 32 N. E. 364." With regard to the second reason it was observed that the law "assumes to dictate to what extent the capacity to labor may be exercised by the employee,

and takes away the right of private judgment as to the amount and duration of the labor to be put forth in a specified period. When the legislature thus undertakes to impose an unreasonable and unnecessary burden upon any one citizen or class of citizens, it transcends the authority intrusted to it by the Constitution, even though it imposes the same burden upon all other citizens or classes of citizens. General laws may be as tyrannical as partial laws. A distinguished writer upon constitutional limitations has said that general rules may sometimes be as obnoxious as special, if they operate to deprive individual citizens of vested rights, and that, while every man has a right to require that his own controversies shall be judged by the same rules which are applied in the controversies of his neighbors, the whole community is also entitled, at all times, to demand the protection of the ancient principles which shield private rights against arbitrary interference, even though such interference may be under a rule impartial in its operation. Cooley, Const. Lim. 5th ed. 434, *355; *Bank of Columbia v. Okely* (1819) 4 Wheat. 235, 4 L. ed. 559." Criticizing the case of *Com. v. Hamilton Mfg. Co.* note 8, *infra*, the court pointed out that under the Constitution of Massachusetts (art. 4, § 1), the legislature has power to ordain all manner of wholesome and reasonable statutes, with or without penalties, not repugnant to the Constitution, "as they shall judge to be for the good and welfare of the commonwealth, and for the governing and ordering thereof, and of the subjects of the same." It was declared that the decision above cited "was evidently made in view of the large discretion so vested in the legislative branch of the government." The opinion was expressed that this Massachusetts case is opposed to the current of authority, as it assumed that the police power is practically without limitation; whereas the view commonly held is that

counsel that the sex of the persons affected by the enactment afforded a sufficient reason for treating it as a permissible exercise of the police power. But this contention was rejected on the ground that a woman is a "person" within the meaning of the 14th Amendment of the Federal Constitution, and therefore entitled to the same rights as a man in respect of making contracts with reference to her labor. This doctrine was considered to involve the corollary that "the mere fact of sex will not justify the legislature in putting forth the police power of the state for the purpose of limiting her exercise of those rights, unless the courts are able to see that there is some fair, just, and reasonable connection between such limitation and the public health, safety, or welfare proposed to be secured by it." The court could perceive no reasonable ground for fixing eight hours in one day as the limit within which women work without deleterious consequences; and in any event, it was questionable whether the police power could be exercised to prevent injury to an individual engaged in a particular occupation.

The more recent statute under which the employment of women in any mechanical establishment or factory or laundry is limited to ten hours in a day has been upheld as a legitimate exercise of the police power, on the ground that, as a general rule, they cannot, without impairing their health, work a greater number of hours in such occupations, and that the public welfare demands that this impairment should be prevented.⁵ The contention that it was invalid,

"the legislature cannot so use that power as to invade the fundamental rights of the citizen; and it is for the courts to decide whether a measure, which assumes to have been passed in the interest of the public health, really 'relates to and is convenient and appropriate to promote the public health.'" The court then said: "The reasoning of the opinion in the Massachusetts case cited does not seem to us to be sound. It assumes that there is no infringement upon the employer's right to contract, because he may employ as many persons or as much labor as he chooses; nor upon the employee's right to contract, because she may labor as many hours as she chooses in some other occupation than that specified in the statute. This is a begging of the question. The right to contract would be valueless, if it could not be exercised with reference to the particular subject-matter in hand. If its exercise is forbidden

between two persons, competent to contract and concerning a lawful subject of contract, it is none the less abridged because other persons may be permitted to contract, or because the same persons may be at liberty to contract about some other matter."

⁵ *W. C. Ritchie & Co. v. Wayman* (1910) 244 Ill. 509, 27 L.R.A. (N.S.) 994, 91 N. E. 695; *People v. Bowes-Allegretti Co.* (1910) 244 Ill. 557, 91 N. E. 701. In the former case the court said: "It is known to all men (and what we know as men we cannot profess to be ignorant of as judges) that woman's physical structure and the performance of maternal functions place her at a great disadvantage in the battle of life; that while a man can work for more than ten hours a day without injury to himself, a woman, especially when the burdens of motherhood are upon her, cannot; that while a man can work standing upon his feet for more

as being special legislation, was rejected.⁶ With the conclusions thus arrived at, the court attempted to reconcile its previous decision upon the very narrow ground that in the opinion delivered in the earlier case there was nothing to show that an enactment specifying ten

than ten hours a day, day after day, without injury to himself, a woman cannot; and that to require a woman to stand upon her feet for more than ten hours in any one day, and perform severe manual labor while thus standing, day after day, has the effect to impair her health; and that as weakly and sickly women cannot be the mothers of vigorous children, it is of the greatest importance to the public that the state take such measures as may be necessary to protect its women from the consequences induced by long, continuous manual labor in those occupations which tend to break them down physically. It would therefore seem obvious that legislation which limits the number of hours which women shall be permitted to work to ten hours in a single day in such employments as are carried on in mechanical establishments, factories, and laundries would tend to preserve the health of women and insure the production of vigorous offspring by them, and would directly conduce to the health, morals, and general welfare of the public; and that such legislation would fall clearly within the police power of the state." Referring to the case of *Burcher v. People*, note 1, *supra*, the court observed that it "is not an authority either as to the validity or invalidity of a statute limiting the number of hours which women shall be permitted or required to work in any one day, as the validity of the statute, in so far as it prohibited women from working more than eight hours in any one day, was not considered or decided in that case." The decision in *People v. Williams*, note 11, *infra*, was distinguished on the ground that it does not determine the validity of that portion of the New York statute which makes it unlawful to permit or suffer a woman to work in any of the prohibited employments more than ten hours per day, the scope of the ruling being expressly limited to the validity of that portion of the act which prohibited a woman from working before 6 o'clock in the morning or after nine o'clock in the evening.

⁶The grounds relied upon in this M. & S. Vol. VIII.—554.

point of view are thus stated in the opinion: "First, that it singles out the business of those persons who are conducting mechanical establishments or factories or laundries, and prohibits the employment of females in those establishments for a longer time than ten hours in any one day, while other establishments engaged in substantially the same business are permitted to employ females any number of hours in one day; second, that it has the effect to divide men and women into classes; and, third, that after women have been set aside as a class, to then divide women into two classes,—that is, that women who work in mechanical establishments or factories or laundries are only permitted to work ten hours in any one day, and that women who are not employed in mechanical establishments, factories, or laundries are permitted to work any number of hours in any one day,—is special and class legislation." Discussing this contention, the court said: "The business places which are enumerated by the statute—that is, mechanical establishments, factories, and laundries—form a class by themselves, and differ from mercantile establishments, hotels, restaurants, etc., in this, that the product of those establishments enumerated in the statute is largely produced by machinery, or the employees of such establishments work with machinery, or the pace at which the employees work in such establishments is set by other employees who work with machinery. It would seem, therefore, that the legislature has not arbitrarily carved out a class of establishments in which women whose time of employment is limited to ten hours a day are to work, but that the line of demarcation between the establishments to which the ten-hour limit applies and those to which it does not apply is clearly defined. . . . We have already pointed out that the physical structure and maternal functions of women place them at such a disadvantage in the struggle for existence as to form a substantial difference between the sexes,—a difference which, in our

hours as the limit of a day's work for women would have been pronounced invalid.⁷ But its argument in this connection is by no means satisfactory. It is apprehended that most impartial critics who have no special interest in harmonizing the two cases will regard them as being essentially inconsistent, and explain that inconsistency as being due to the circumstance that they reflect fundamentally distinct theories as to the differentiating significance ascribed to the element of sex.

c. Massachusetts.—The enactment limiting to ten the hours during which women, whether adults or not, and minors, may be employed in certain occupations, has been declared to be, in respect of a female employee, a valid exercise of the police power.⁸

judgment, is of such a substantial character as to form a basis for legislation, without making the legislation subject to the objection that it was not a proper exercise of the police power. The differences existing between the sexes has often formed the basis of a classification upon which to found legislation. It is this distinction, when used as a basis of legislation which authorizes legislation exempting women from military and jury service and from working upon the public highways or working in mines, and which permits men to enjoy, alone, the elective franchise and to hold public office, and fixes their status as the head of the family in exemption and homestead laws. As to the third objection, that women by the act are divided into two classes,—that is, those whose service is limited to a ten-hour day and those whose service is not thus limited,—we have also already suggested the answer to this contention, namely, that those women whose service is limited to a ten-hour day work in establishments whose product is produced by machinery, or whose employees work with machinery, or the pace at which such employees work is set by other employees who work with machinery. We think that women thus situated, while at work, are under a pressure and spur which is much more likely to drive them to over-exertion when exhausted by long-continued effort and thereby to impair their health, than are their more favored sisters likely to be driven who are engaged in an employment which is not forced at all times up to the limit of production by the agencies of steam, electricity, or other

motor power when applied to machinery. There is, therefore, we think an obvious and clear distinction between the two classes of women when working in the class of employment covered by the statute and in other vocations of life, by reasons of their environment when at work."

⁷ In this point of view the court remarked (p. 528): "Can it be said if the limitation upon the number of hours which women are permitted to work in the designated callings, in the act of 1893, had been fixed at ten hours, instead of eight hours, the court would have held the act unconstitutional as an unreasonable exercise of the police power of the state, or that the act would have been held obnoxious to the Constitution as special or class legislation? We do not think it can so be said, as there is throughout the opinion a veiled suggestion which indicates that it was the opinion of the court that the limitation of the right to work longer than eight hours was an unreasonable limitation upon the right to contract, while the right to contract for a longer day, at least under some circumstances, might be a valid limitation upon the right to contract."

⁸ *Com. v. Hamilton Mfg. Co.* (1876) 120 Mass. 383 (Stats. of 1874, chap. 221), applicable to manufacturing establishments). It was argued by the counsel for the defendant that the defendant's act of incorporation was a contract with the commonwealth, and that the act under discussion impaired that contract; that an act of incorporation to manufacture cotton and woollen goods, by necessary implication, con-

d. Michigan.—The enactment which provides that no female shall be employed in any factory, mill, or warehouse, etc., or any place where any kind of manufacture is carried on, more than nine hours a day, has been sustained against the objections (1) that it interferes with the right to labor and the right to make contracts pertaining thereto; and (2) that it is improper class legislation in that it contains an exceptive clause with regard to canning establishments and places where perishable fruits, etc., are preserved.⁹

e. Nebraska.—The enactment which limits to ten the hours of work for women in manufacturing, mechanical, or mercantile establishments, and hotels and restaurants, has been upheld.¹⁰ The position taken was that as it had a uniform and general application to all

ferred upon the corporation the legal capacity of hiring all the labor needful for this work. The court, however, said: "If this is conceded to the fullest extent, it is only a contract with the corporation that it may contract for all lawful labor. There is no contract implied that such labor as was then forbidden by law might be employed by the defendant; or that the general court would not perform its constitutional duty of making such wholesome laws thereafter as the public welfare should demand. The law, therefore, violates no contract with the defendant." Discussing the further question whether it is in violation of any right reserved under the Constitution to the individual citizen, the court said: "Upon this question, there seems to be no room for debate. It does not forbid any person, firm, or corporation from employing as many persons or as much labor as such person, firm, or corporation may desire; nor does it forbid any person to work as many hours a day or a week as he chooses. It merely provides that in an employment, which the legislature has evidently deemed to some extent dangerous to health, no person shall be engaged in labor more than ten hours a day or sixty hours a week. There can be no doubt that such legislation may be maintained either as a health or police regulation, if it were necessary to resort to either of those sources for power. . . . It is also said that the law violates the right of Mary Shirley to labor in accordance with her own judgment as to the number of hours she shall work. The obvious and conclusive reply to this is, that

the law does not limit her right to labor as many hours per day or per week as she may desire; it does not in terms forbid her laboring in any particular business or occupation as many hours per day or per week as she may desire; it merely prohibits her being employed continuously in the same service more than a certain number of hours per day or week, which is so clearly within the power of the legislature that it becomes unnecessary to inquire whether it is a matter of grievance of which this defendant has the right to complain." For criticisms of the reasoning in this opinion, see notes 2 and 3, *supra*.

⁹ *Withey v. Bloem* (1910) 163 Mich. 419, 35 L.R.A.(N.S.) 628, 128 N. W. 913, following *Muller v. Oregon*, cited in note 11a, *infra*, and *Ritchie v. Wayman*, note 5, *supra*.

¹⁰ In *Wenham v. State* (1902) 65 Neb. 394, 58 L.R.A. 825, 91 N. W. 421, the court said: "Women and children have always, to a certain extent, been wards of the state. . . . They are unable, by reason of their physical limitations, to endure the same hours of exhaustive labor as may be endured by adult males. Certain kinds of work which may be performed by men without injury to their health would wreck the constitutions and destroy the health of women, and render them incapable of bearing their share of the burdens of the family and the home. The state must be accorded the right to guard and protect women, as a class, against such a condition; and the law in question, to that extent, conserves the public health and welfare. On the question of the right to contract we may well declare a law

women employed in the establishments specified it was not open to objection as being class legislation; that it did not deprive any citizen of his property or the reasonable use thereof, without due process of law; and that it did take away the right of contract.

f. New York.—The statute which provides that no female shall be employed, or permitted or suffered, to work in a factory before 6 o'clock in the morning or after 9 o'clock in the evening, has been held invalid, as being an undue restriction upon the freedom of contracting.¹¹ The broad position taken by the court was that "an adult female is not to be regarded as a ward of the state, or in any

unconstitutional which interferes with or abridges the right of adult males to contract with each other in any of the business affairs or vocations of life. The employer and the laborer are practically on an equal footing, but these observations do not apply to women and children. Of the many vocations in this country, comparatively few are open to women. Their field of remunerative labor is restricted. Competition for places therein is necessarily great. The desire for place, and in many instances the necessity of obtaining employment, would subject them to hardships and exactions which they would not otherwise endure. The employer who seeks to obtain the most hours of labor for the least wages has such an advantage over them that the wisdom of the law, for their protection, cannot well be questioned. No doubt, these considerations were the moving cause for the passage of the law in question. If the act is the result of a fair, reasonable exercise of police power, it should be upheld."

¹¹ *People v. Williams* (1907) 189 N. Y. 131, 136, 12 L.R.A.(N.S.) 1130, 121 Am. St. Rep. 854, 81 N. E. 778, 12 Ann. Cas. 798, affirming (1906) 116 App. Div. 379, 101 N. Y. Supp. 562. The court said: "It is claimed, however, in this case, that the enactment in question can be justified as an exercise of the police power of the state; having for its purpose the general welfare of the state in a measure for the preservation of the health of the female citizens. It is to be observed that it is not a regulation of the number of hours of labor for working women; the enactment goes far beyond this. It attempts to take away the right of a woman to labor before 6 o'clock in the morning, or after 9 o'clock in the evening, without

any reference to other considerations. In providing that 'no female shall be employed, permitted, or suffered to work in any factory in this state before 6 o'clock in the morning, or after 9 o'clock in the evening of any day,' she is prevented, however willing, from engaging herself in a lawful employment during the specified periods of the twenty-four hours. Except as to women under twenty-one years of age, this was the first attempt on the part of the state to restrict their liberty of person, or their freedom of contract, in the pursuit of a vocation. I find nothing in the language of the section which suggests the purpose of promoting health, except as it might be inferred that for a woman to work during the forbidden hours of night would be unhealthful. If the inhibition of the section in question had been framed to prevent the ten hours of work from being performed at night, or to prolong them beyond 9 o'clock in the evening, it might, more readily, be appreciated that the health of women was the matter of legislative concern. That is not the effect, nor the sense, of the provision of the section with which, alone, we are dealing. It was not the case upon which this defendant was convicted. If this enactment is to be sustained, then an adult woman, although a citizen and entitled as such to all the rights of citizenship under our laws, may not be employed, nor contract to work, in any factory for any period of time, no matter how short, if it is within the prohibited hours; and this, too, without any regard to the healthfulness of the employment. It is clear, as it seems to me, that this legislation cannot, and should not, be upheld as a proper exercise of the police power. It is certainly discriminative against fe-

other light than the man is regarded, when the question relates to the business pursuit or calling. She is no more a ward of the state than is the man. She is entitled to enjoy, unmolested, her liberty of person, and her freedom to work for whom she pleases, where she pleases, and as long as she pleases, within the general limits operative on all persons alike. . . . In the gradual course of legislation upon the rights of a woman, in this state, she has come to possess all of the responsibilities of the man, and she is entitled to be placed upon an equality of rights with the man." The decision thus rendered is not inconsistent with the cases in which enactments limiting the number of hours that women may lawfully work in one day have been upheld. But the broad language used by the court concerning the equality of the sexes with respect to their constitutional rights indicates that it regarded such enactments also as being invalid. If that was the doctrine then held by the court, all that need be remarked is that the situation has been materially changed by the decision of the Federal Supreme Court which is reviewed in subsec. *g*, *post*.

g. Oregon.—By the Federal Supreme Court, an Oregon enactment which declares that no female shall be employed in a mechanical establishment or factory or laundry more than ten hours during any one day has been upheld against the objections that it violates the 14th Amendment of the Federal Constitution, and that it is improper class legislation. The *ratio decidendi* was that the dissimilarity between the physical characteristics of men and women is sufficiently great to justify the application of different standards in determining the validity of restrictive legislation with regard to each of the sexes.^{11a}

male citizens, in denying to them equal rights with men in the same pursuit. The courts have gone very far in upholding legislative enactments, framed clearly for the welfare, comfort, and health of the community; and that a wide range in the exercise of the police power of the state should be conceded. I do not deny; but when it is sought under the guise of a labor law, arbitrarily, as here, to prevent an adult female citizen from working at any time of the day that suits her, I think it is time to call a halt. It arbitrarily deprives citizens of their right to contract with each other. The tendency of legislatures, in the form of regulatory measures, to interfere with the lawful

pursuits of citizens, is becoming a marked one in this country, and it behooves the courts, firmly and fearlessly, to interpose the barriers of their judgments, when invoked to protect against legislative acts plainly transcending the powers conferred by the Constitution upon the legislative body."

^{11a} In *Muller v. Oregon* (1908) 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957, affirming (1906) 48 Or. 252, 120 Am. St. Rep. 805, 85 Pac. 855, 11 Ann. Cas. 88, the court argued thus: "That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when

h. Pennsylvania.—An inferior court has affirmed the validity of an enactment limiting to twelve hours in one day the employment of minors, male and female, and adult women, in any manufacturing establishment, mercantile industry, laundry workshop, renovating works, or printing office.¹² The contention that such an enactment unduly interferes with the right of adult women to acquire and possess property was rejected.

i. Washington.—A statute limiting to ten the hours of work for women in mechanical and mercantile establishments, laundries, ho-

the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon her body; and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve strength and vigor of the race. Still, again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the schoolroom are opened, and her opportunities for acquiring knowledge are great, yet even with that, and the consequent increase of capacity for business affairs, it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the view point of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed

for her protection may be sustained, even when like legislation is not necessary for man and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her."

¹² *Com. v. Beatty* (1900) 15 Pa. Super. Ct. 5, affirming decision of quarter sessions in (1899) 16 Montg. Co. L. Rep. 63, 23 Pa. Co. Ct. 300, 8 Pa. Dist. R. 712 (Act of April 29, 1897, P. L. 30.)

tels, and restaurants has been pronounced valid.¹³ The contention that it was invalid as depriving women of their liberty without due process of law was rejected.

2837. Enactments forbidding the employment of women in certain occupations.—*a. California.*—The decisions in this jurisdiction have all been rendered with reference to a special provision of the state Constitution, to the effect that “no person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession.” The effect of the cases, as they stand, seems to be this,—that this provision is violated by a municipal ordinance which is so worded as directly to prohibit the employment of females as waitresses in places where intoxicating liquors are sold, but not by an ordinance which merely imposes a differential license tax of which the necessary result is to restrict that employment.¹

¹³ *State v. Buchanan* (1902) 29 Wash. 602, 59 L.R.A. 342, 92 Am. St. Rep. 930, 70 Pac. 52 (Sess. Laws 1901, p. 118). The court said: “We think it is easily ascertainable from a perusal of this act that its object was the public health, and that its provisions were appropriate, and adopted to that end. It is a matter of universal knowledge with all reasonably intelligent people of the present age that continuous standing on the feet by women for a great many consecutive hours is deleterious to their health. It must logically follow that that which would deleteriously affect any great number of women who are the mothers of succeeding generations must necessarily affect the public welfare and the public morals.”

¹ In *Re Maguire* (1881) 57 Cal. 604, 40 Am. Rep. 125, an ordinance was held void which declared that “every person who causes, procures, or employs any female to wait or in any manner attend on any person in any dance cellar, bar-room, or in any place where malt, vinous, or spirituous liquors are used or sold, and every female who in such place shall wait or attend on any person, is guilty of a misdemeanor.” The court said: “In our opinion the natural and ordinary sense of ‘disqualify’ is to incapacitate or disable, to devert or deprive of qualifications, and that it was used in this sense in the section under examination. The language of the ordinance is plain and its meaning unmistakable. It leaves nothing for construction. The words employed in

this ordinance incapacitate a woman from following the business for which the petitioner was fined, and disable her from doing so. This being so, she is disqualified by the ordinance under consideration from pursuing a business lawful for men. We are compelled to adopt this, or admit that while the legislature cannot disqualify a person on account of sex from following a lawful business by direct enactment, it may by indirection accomplish the same end by forbidding, under a penalty, the prosecution of such business. Such legislation as that just above indicated could only be considered an evasion of the constitutional provision. Such an enactment would be as much a violation of the paramount law as one disqualifying by express words. A woman offending would be liable to the penalty for every day she was so employed. This would usually be considered as disabling, as imposing a disqualification, and therefore as disqualifying. But it is further contended that the inhibition or disqualification is not on account of sex, but on account of its immorality; that such employment of a woman is of a vicious tendency and hurtful to sound public morality, and that this only is the object and design of the ordinance. It is not contended that such business is *malum in se*, but of a hurtful and immoral tendency. It may be admitted that such is its object and design, but this object is aimed to be accomplished by an ordinance which precludes a woman from a lawful business. It is said that the presence of

women in such places has this tendency. If men only congregate, this tendency does not exist in so hurtful a degree; at any rate, it has not been regarded so hurtful, and has not fallen as yet under the legislative ban. So that it comes at least to this, that the preclusion and disqualification is on account of sex. As we have in effect said above, the attempt is thus made to do that by indirection which cannot be done directly. The organic law of the land annuls all such enactments. . . . The § 18 of article 20 imposes a restraint on every law-making power in the state, whether an act of the legislature, or an ordinance or by-law of a municipal corporation. It is a positive declaration, made by the sovereign authority, that whatever may be done under the legislative power in any and every shape or form, shall never, by direct or indirect action, incapacitate any person on account of sex from entering upon or pursuing any lawful business, vocation, or profession. This power to make police regulations is as much restrained by the section just referred to as is the legislative power vested in the senate and assembly. Both grants of power are alike made by the Constitution, and both are alike restricted by this section of article 20." Two judges dissented from the judgment. McKinstry, J., who concurred, qualified his position by the following remarks: "I am not prepared to say, however, that the supervisors cannot, by proper legislation, prevent females from pursuing a vocation which, although permissible to men, involve a propinquity of the sexes under such circumstances as may lead directly to immoral results, or to the desecration of the prudent reserve between members of the opposite sexes, which it is the province of wise legislation to encourage. It has always been understood that the prevention of such results was a proper exercise of the police power of the state. By such legislation the woman (or the man, as the case may be) is not prohibited from pursuing any lawful business, vocation, or profession 'on account of her sex;' she is prohibited because of the immorality or indecency connected with the business. For example: There might be very good reason why women (and not men) should be employed as attendants at a bathing establishment to which their own sex alone have admission; but if a

law should be enacted prohibiting the employment of females as attendants at public baths—frequented by men only—would it be adjudged that the law was unconstitutional because persons would thereby be prohibited from pursuing a vocation 'on account of sex?' The Constitution provides that no person shall be prohibited from pursuing any lawful business merely because of his or her sex, but it does not prohibit the legislature from declaring certain conduct unlawful, even though it may constitute a 'business.' The Constitution does not, in my view, deny the power to enact such legislation as may prevent the intrusion of men into the conjoint pursuit with women of occupations which considerations of decency and morality require should be carried on by the latter separately, and *vice versa*."

In *Ex parte Felchlin* (1892) 96 Cal. 360, 31 Am. St. Rep. 223, 31 Pac. 224, it was held that a city ordinance which fixed the license for the carrying on of a saloon where females were employed, and where intoxicating liquors were sold in less quantities than one quart, at a higher rate than a license for the carrying on of a saloon where females were not employed, was a valid exercise of the police power, and not open to the objections made to the ordinance under discussion in the *Maguire Case*, *supra*.

In *Ex parte Hayes* (1893) 98 Cal. 555, 20 L.R.A. 701, 33 Pac. 337, a municipal ordinance declaring it to be unlawful to sell liquors without a license, and providing that no license shall be issued to persons engaged in the sale of liquors in dance cellars or dance halls, or in places where musical or theatrical, or other public exhibitions are given, and where females attend as waitresses, was held to be a valid exercise of the power conferred by § 11 of art. 11 of the state Constitution upon counties, cities, and towns, to make "all such local, police, sanitary, or other regulations as are not in conflict with general laws." It was further held that this ordinance did not violate the provision of the state Constitution which prohibits disqualification of any person on account of sex; the position taken being that this provision does not operate as a limitation upon the power of the state or its municipalities to prescribe the conditions upon which the business of retailing intoxicating liquors shall be permitted to be carried on, or in regu-

b. Montana.—The enactment which prohibits the sale of liquors in any place where women or minors are employed has been held to be a proper exercise of the police power.²

c. New Jersey.—It has been held that a municipal ordinance declaring it to be unlawful for the proprietor of a place where intoxicating liquors are sold to employ women is a valid police regulation, and that it does not deny the equal protection of the laws, nor infringe the privileges or immunities of citizenship which are protected by the United States Constitution or the 14th Amendment thereof. The sale of such liquors may be entirely prohibited, and its regulation, when permitted, is at the discretion of the several states.³

d. Ohio.—An ordinance declaring it to be unlawful for the proprietor of a place where intoxicating liquors are sold to employ females to serve his customers has been held not to violate the 14th Amendment of the Federal Constitution.⁴

e. Washington.—A statute which declares that "no female person shall be employed in any capacity in any saloon, beer hall, barroom, theater, or place of amusement where intoxicating liquors are sold as a beverage," has been upheld by the supreme court of the state, against the objection that it is an unlawful interference with the right of contract.⁵ It has also been declared by a Federal court not

lating the manner in which such business shall be conducted. *Re Maguire*, *supra*, was not referred to.

² *State ex rel. Marion v. Reynolds* (1894) 14 Mont. 383, 36 Pac. 449 (Comp. Stat. § 261 [4]). The court distinguished the California cases cited in note, *supra*, as having been decided with reference to provisions not found in the organic law of Montana.

³ *Hoboken v. Goodman* (1902) 68 N. J. L. 217, 51 Atl. 1092.

⁴ *Bergman v. Cleveland* (1884) 39 Ohio St. 651.

⁵ *State v. Considine* (1897) 16 Wash. 358, 47 Pac. 755. The court said: "Defendant contends that a female is a citizen, and that her liberty to contract is abridged by the statute, and argues that before the law her right to a choice of vocations cannot be denied on account of sex. But that liberty to contract was always limited to lawful contracts is elementary law, and the courts have followed it from time immemorial, and contracts against public policy or good morals cannot be enforced, and it

was always competent for the legislative power to prohibit acts under them by attaching a penalty. When the law-making power—the legislature—has spoken and prohibited a contract, that ends the right to enter into such contract, if the authority is vested in the legislature to enact the prohibition. The statute in question is evidently intended by the legislature for the maintenance of good morals and for preventing a nuisance. The legislature is the supreme authority, within constitutional limitations, to determine what is and what is not an immoral business or a nuisance; and when it has so determined, its enactment is valid unless the legislative act is clearly partial, arbitrary, and oppressive. The prohibition of employment of a female person, in the statute under which defendant was convicted, uniformly applies to all persons employing, and who are engaged in a like business with defendant, and extends to all female persons employed. After the enactment of the law of March 19, 1895, it became a part of the

to be invalid as abridging the privileges and immunities of citizens, or denying the equal protection of the laws.⁶

E. ENACTMENTS RELATING TO MINORS.

2838. Enactments limiting the age at which minors may be employed.

—It is fully settled that legislation which prescribes the age at which children may lawfully be hired to perform various kinds of work is within the scope of the police power of the states.¹ The constitutional provisions which protect the right of contract are deemed to be applicable only to adults, and consequently not a bar to such legislation.² Nor are they invalid, as depriving parents of the right to em-

'law of the land,' and the defendant was properly convicted of its violation."

⁶*Re Considine* (1897) 83 Fed. 157. The court said: "The intent of the legislature is manifest to check the tendency towards immorality of the association of the sexes in places of resort where intoxicating beverages are sold and where the worst passions are aroused." The act was held to be general in its scope, applying equally to all persons similarly situated.

¹*Lenahan v. Pittston Coal Min. Co.* (1907) 218 Pa. 311, 12 L.R.A.(N.S.) 461, 120 Am. St. Rep. 885, 67 Atl. 642 (Pa. act of June, 1891, forbidding the employment of minors under fifteen years to oil machinery); *Stehle v. Jaeger Automatic Mach. Co.* (1908) 220 Pa. 617, 69 Atl. 1116, 14 Ann. Cas. 122 (Pa. act of May 2, 1905, forbidding employment of children in certain kinds of dangerous labor); *People v. Taylor* (1908) 124 App. Div. 434, 108 N. Y. Supp. 796 (regulation of the employment of children under sixteen years of age in factories by labor law of 1897, § 70, said *arguendo*, to be a police regulation, which the legislature had full power to enforce); *New York v. Chelsea Jute Mills* (1904; Mun. Ct.) 43 Misc. 266, 88 N. Y. Supp. 1085 (§ 4 of the consolidated school law N. Y. Law 1903, chap. 459, which provides that it should be unlawful for any person, firm, or corporation to employ any child under fourteen years of age in any business or service whatever during any part of the school term,—held to be valid); *Collett v. Scott* (1906) 30 Pa. Super. Ct. 430 (statute declaring it unlawful to employ any minor under sixteen years of

age inside of any anthracite coal mine, or to employ any minor under fourteen years in any anthracite coal breaker or colliery, or around the outside workings of any anthracite coal mine, was held valid); and cases cited in following notes.

²*Starnes v. Albion Mfg. Co.* (1908) 147 N. C. 556, 17 L.R.A.(N.S.) 602, 61 S. E. 525, 15 Ann. Cas. 470. There the court cited with approval the following passages from the works of text-writers: "So far as such regulations control and limit the powers of minors to contract for labor, there has never been, and never can be, any question as to their constitutionality. Minors are the wards of the nation, and even the control of them by parents is subject to the unlimited supervisory control of the state." 1 Tiedeman, *State & Federal Control of Persons and Property*, p. 335.

"The constitutionality of legislation for the protection of children or minors is rarely questioned; and the legislature is conceded a wide discretion in creating restraints." "Even the courts which take a very liberal view of individual liberty and are inclined to condemn paternal legislation would concede that such paternal control may be exercised over children, especially so in the choice of occupations, hours of labor, payment of wages, and everything pertaining to education, and in these matters a wide and constantly expanding legislative activity is exercised." Freund, *Pol. Power*, § 259.

In *State v. Shorey* (1906) 48 Or. 396, 24 L.R.A.(N.S.) 1121, 86 Pac. 881, the court said: Minors "are not *sui juris*,

ploy their children in any lawful occupation.³ The right of parents

and can only contract to a limited extent. They are wards of the state and subject to its control. As to them, the state stands in the position of *parens patriæ*, and may exercise unlimited supervision and control over their contracts, occupation, and conduct, and the liberty and right of those who assume to deal with them. This is a power which inheres in the government for its own preservation and for the protection of the life, person, health, and morals of its future citizens. . . . The supervision and control of minors is a subject which has always been regarded as within the province of legislative authority. How far it shall be exercised is a question of expediency and propriety which it is the sole province of the legislature to determine. The judiciary has no authority to interfere with the legislature's judgment on that subject, unless, perhaps, its enactments are so manifestly unreasonable and arbitrary as to be invalid on that account. It is not a question on constitutional power." This court also approved the statements of Mr. Tiedeman and Mr. Freund, as quoted above.

In *Bryant v. Skillman Hardware Co.* (1908) 76 N. J. L. 45, 69 Atl. 23, it was urged that a statute prohibiting the employment of children under fourteen years of age in factories (act of March 24, 1904) contravened the following provision in the state Constitution (art. 1, § 1): "All men . . . have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness." But the court said: "The argument advanced under this point nullifies the words 'all men' in the section just quoted, by making them mean 'all minors,' and ignores the entire mass of legislation and judicial decision that has grown up upon the practically unquestioned assumption that minors are not men, and that until they become men they are, as regards legislation aimed at their welfare and protection, wards of the state."

³ *People v. Ewer* (1894) 141 N. Y. 129, 25 L.R.A. 794, 38 Am. St. Rep. 788, 36 N. E. 4, affirming (1893) 70 Hun, 239, 24 N. Y. Supp. 500. There

the court, referring to the provision in the New York Penal Code which prohibits the employment or exhibition of girls under fourteen years of age, as dancers or in theatrical exhibitions, said: "It is true enough that, if the court could say that this legislation was an arbitrary exercise of the legislative power, depriving the parent of a right to a legitimate use of his child's services; that, while ostensibly for the promotion of the well-being of children, in reality, it strikes at an inalienable right, or at the personal liberty of the citizen and but remotely concerned the interests of the community, it would be its duty to so pronounce and to declare its invalidity. But this legislation has no such destructive effect or tendency. It does not deprive the parent of the child's custody, nor does it abridge any just rights. It interferes to prevent the public exhibition of children, under a certain age, in spectacles or performances which, by reason of the place or hour, of the nature of the acts demanded of the child performer, and of the surroundings and circumstances of the exhibition, are deemed by the legislature prejudicial to the physical, mental, or moral well-being of the child, and, hence, to the interests of the state itself. Take the facts of this case, and they seem sufficiently to warrant the interference of the law. It is not necessary to reason upon them. The scanty dress of the ballet dancer, the pirouetting and various other described movements with the limbs and the vocal efforts, cannot be said to be without possible prejudice to the physical condition of the child; while, in the glare of the footlights, the tinsel surroundings, and the incense of popular applause, it is not impossible that the immature mind should contract such unreal views of existence as to unfit it for the stern realities and exactions of later life. The statute is not to be construed as applying only when the exhibition offends against morals or decency, or endangers life or limb by what is required of the child actor. Its application is to all public exhibitions or shows. That any and all such shall be deemed prejudicial to the interest of the child, and contrary to the policy of the state to permit, was for the legislature to consider

to the services of their children is subordinate to the paramount power of the state to legislate for the general welfare.⁴

Legislation of this type, however, may be annulled if it "indicates a purpose on the part of the legislature to make use of the laudable object of protecting children as a mere pretense under which to impose burdens upon some occupations or trades and favor others,"⁵ or the classification upon which it is based is otherwise arbitrary or unreasonable.⁶ But the decisions, as they stand, seem to justify the conclusion that, where enactments designed for the protection of minors are concerned, the courts are much more strongly disinclined to exercise their power of annulment on this ground than they are in cases where they are called upon to determine the validity of enactments relating to adults only. That the given statute is applicable only to certain descriptions of business is not regarded as a sufficient reason for pronouncing it invalid.⁷ The accepted theory is that, in designating the particular occupations in which the employment of children of various ages shall be permitted or prohibited "the legislature has large discretion. It must determine the degree of injury to health or morals which the different kinds of employment inflict upon the child, and the corresponding necessity for protecting the

and to say. The right to personal liberty is not infringed upon, because the law imposes limitations or restraints upon the exercise of the faculties with which the child may be more or less exceptionally endowed. The inalienable right of the child, or adult, to pursue a trade is indisputable; but it must be not only one which is lawful, but which, as to the child of immature years, the state or sovereign, as *parens patriæ*, recognizes as proper and safe. It is not the strict moralist's view, dictated by prejudice, but the view from the standpoint of a member of the body politic, which ranges the judgment in support of legislative interference to restrain the parent from permitting an employment of the child under circumstances deemed unsuited, to its proper mental, moral, or physical development."

⁴ *Starnes v. Albion Mfg. Co.* (1908) 147 N. C. 556, 17 L.R.A. (N.S.) 602, 61 S. E. 525, 15 Ann. Cas. 470 (N. C. Acts 1903, chap. 473, § 1, forbidding the employment of children under twelve years of age in factories).

⁵ In *Re Spencer* (1906) 149 Cal. 396, 117 Am. St. Rep. 137, 86 Pac. 896, 9

Ann. Cas. 1105, the court emphasized the fact that the enactment in question (see note 6, *infra*) did not indicate any such purpose.

⁶ In *Collett v. Scott* (1906) 30 Pa. Super. Ct. 430, a provision in the Pennsylvania statute which limits the age at which minors may be employed in anthracite mines (act of May 2, 1905, P. L. 344) was held to deny the equal protection of the laws, in respect of its attempting to divide the minors who had reached the age prescribed in the statute into two classes, those who could furnish certain certificates as to date of birth, baptism, etc., and those who could not.

⁷ In *Re Weber* (1906) 149 Cal. 392, 86 Pac. 809, the court, referring to §§ 272, 273, of the Penal Code, which forbid the employment of children under the age of sixteen years in certain dangerous and immoral occupations, said: "It is competent for the legislature to provide regulations for the protection of children of immature years, and the legislative judgment in regard to the proper age at which such regulations shall become applicable to the child is conclusive."

child from the effects thereof, and unless its decision in that regard is manifestly unreasonable, there is no ground for judicial interference." ⁸ There is also authority for the doctrine that an exemptive clause which authorizes the issuance of an official permit grant-

⁸ *Re Weber* (1906) 149 Cal. 392, 395, 86 Pac. 809. There it was held that the statute referred to in note 6, *supra*, was not unfairly discriminative, as allowing the employment of children as singers or musicians in churches, schools, and academies, provided the permission of certain officials was obtained.

In another case, decided about the same time, *Re Spencer* (1906) 149 Cal. 396, 117 Am. St. Rep. 137, 86 Pac. 896, 9 Ann. Cas. 1105, the provision in Stat. 1905, p. 11, chap. 18, § 2, which prohibits the employment of children under fourteen years "in any mercantile institution, office, laundry, manufactory, workshop, restaurant, hotel, or apartment house, or in the distribution or transmission of merchandise or messages," was held not to be invalid as being special legislation. The objection to the provision on this score was two fold, *viz.*: (1) That it constituted an unfair discrimination against the particular trades mentioned; and (2) that it unduly and without reasonable cause restricted the right of minors to work at any and every occupation in which they may wish to engage. But the court said: The statute "appears to have been framed in good faith and for the purpose of promoting the general welfare by protecting minors from injury by over-work and by facilitating their attendance at schools. The legislature may undoubtedly forbid the employment of children under the age of fourteen years of any regular occupation, if the interests of the children and the general welfare of society will be thereby secured and promoted. The power to forbid their employment in certain occupations, and not in all, depends on the questions, whether or not any appreciable number of children are employed in the callings not forbidden, and whether or not those callings are injurious to them, or less injurious than those forbidden. If certain occupations are especially harmful to young children, and others are not so, there can be no serious doubt that it is within the power of the legislature to forbid their employment in one class

and permit it in the other. The difference in the results would justify the classification with a view to the difference in the legislation. Also, if children are employed in certain occupations to their injury, and are not employed at all in others, or so infrequently that the number is inappreciable and insignificant, the occupations regularly employing them have no ground to complain of discrimination. They compose the entire class to which the legislation is directed, the class which causes the injury which is to be prevented. And upon the facts assumed, neither the children, nor the persons engaged in the occupations in which they are not employed, would be affected by the prohibition as to other occupations. The preliminary questions as to the effect of the specified occupations on the children, and as to the number of children engaged therein, are questions of fact for the legislature to ascertain and determine. It has determined that the facts exist to authorize the particular legislation. If any rational doubt exists as to the soundness of the legislative judgment upon the existence of the facts, that doubt must be resolved in favor of the legislative action, and the law must accordingly be held to be valid in these respects. . . . The decision of the legislature, that the specified occupations are more injurious to children than other occupations not mentioned, and hence, the subject of special regulation, and that they constitute practically all the injurious occupations in which children are employed at all, and therefore the only cases in which regulation is needed, is not so manifestly incorrect, not so beclouded with doubt concerning its accuracy, as to justify the court in declaring it unfounded, and the law consequently invalid."

In *Mt. Vernon-Woodberry Cotton Duck Co. v. Frankport Marine Acci. & Plate Glass Ins. Co.* (1909) 111 Md. 561, 134 Am. St. Rep. 636, 75 Atl. 105, the court rejected the contention that an enactment prohibiting the employment of children under fourteen years

ing a child of less than the statutory age leave to work under certain circumstances is not discriminative as against other children whose position is such that they cannot derive any benefit from the clause.⁹

of age in mills and factories (Pub. Gen. Law (Md.) 1904, p. 2126, § 4), is unconstitutional because it excepts from its purview owners of canning factories, and makes a distinction between mill owners in Baltimore city and three or four counties and those in all the other counties. The following remarks were made: "The conditions under which children labor in canning factories may be entirely different from the conditions under which they are required to work in other factories or mills, and much less injurious or dangerous to health, and we must assume that the legislature, in exempting from the operation of the act of 1902 'establishments for manufacturing canned goods,' did so for reasons entirely consistent with the purpose of the act to protect the health of the children of the state, and that it acted upon knowledge possessed by it and fully justified the exemption of such establishments from the regulations applicable to other factories and mills. The legislature has determined that it is injurious to the health of children under fourteen years of age to work in mills and factories, other than canning factories, and how is this court to determine that this is not so? We cannot assume that the legislature acted arbitrarily or unreasonably, but must presume, in the absence of any indication to the contrary, that the classification was based on reasonable grounds."

See also *Starnes v. Albion Mfg. Co.* (1908) 147 N. C. 556, 17 L.R.A. (N.S.) 602, 61 S. E. 525, 15 Ann. Cas. 470, where it was held that the provision in N. C. Revisal 1905, § 3362, declaring that no child under twelve years of age shall be employed in any manufacturing establishment or factory, excepting oyster-packing manufactories, does not violate the 14th Amendment of the Federal Constitution.

In *State v. Rose* (1910) 125 La. 462, 26 L.R.A. (N.S.) 821, 51 So. 496, the enactment in § 1, La. Acts 1908, No. 301, which declares it to be unlawful to employ a child under fourteen years of age in any mill, factory, mine, etc., or mercantile establishment in which

more than five persons are employed, or in any place of amusement where intoxicating liquors are sold, or in any other occupation that may be deemed unhealthful or dangerous, has been sustained against the objections that it violates the clause of the 14th Amendment of the Federal Constitution, which prohibits the abridgment of the privileges or immunities of citizens of the United States or the denial to any person of the equal protection of the laws. The court said: "In the enactment of the statute now in question, the legislature had the power to discriminate between occupations, by classifying some of them as unsuited to the proper mental, moral, or physical development of children of tender years. In such a manner the judgment of the court cannot be substituted for the discretion of the lawmaker. The act might have been deemed arbitrary and unreasonable if it had prohibited the employment of children in all kinds of occupation.

. . . The contention that the statute makes an unlawful discrimination between manufacturing, mining, and business occupations employing more than five persons and those employing five persons or less is without force. The Constitution of 1898 adopted a similar basis of classification in the matter of exemption from taxation. Article 230. The lawmaker had to draw the line somewhere so as to exclude from the purview of the general terms of the statute occupations pursued by families or in which but a few persons were employed."

⁹ *Re Spencer* (1906) 149 Cal. 396, 117 Am. St. Rep. 137, 86 Pac. 896, 9 Ann. Cas. 1105. There the court, referring to the California statute cited in note 7, *supra*, to the effect that if either parent of a child makes a sworn statement to the judge of the juvenile court of the county that the child is over twelve years of age, and that the parent or parents are unable, from sickness, to labor, such judge in his discretion may issue a permit allowing such child to work for a time to be specified therein, said: "There is no force to the objection that this discrimi-

2839. **Enactments specifying the hours of work for minors.**—

The Indiana enactment which provides that no person under sixteen years of age, and no female under eighteen years of age, employed in any manufacturing or mercantile establishment, laundry, renovating works, bakery, or printing office shall be allowed to work more than sixty hours in one week, or more than ten hours, has been pronounced valid.¹ The grounds upon which it was unsuccessfully attacked were, that it denied the equal protection of the laws to employers engaged in the descriptions of business covered by it, and deprived them of their property without due process of law;² and

nates against orphans and abandoned children. The exception allowed by the proviso is not made for the direct benefit of the child, but for the sick parent. It is a burden put upon the child, because of the special necessity of his case which justifies the different provision respecting him. The legislature deems the necessity of allowing the child to work to aid in the support of the sick parent sufficient to outweigh the benefits which would otherwise accrue from the education and protection of the child during such inability. If there are no parents whose necessities the child's labor could alleviate, the reason for this exception is wanting. The provision seems a reasonable one in view of the conditions upon which alone it can apply. . . . The act of 1903, in effect, requires all children to attend, either the public schools or a private school, during at least five months of the time of the sessions of the public schools. The amendment of March 20, 1905, extends the time of such compulsory attendance so as to embrace the whole period of the public school session. Therefore, if the parents, guardians, or custodians of a child choose to send it to a private school, it must attend thereon at least during the time the public schools are in session. A permit may then be obtained for it to work during the vacation of the public schools, if its interests or necessities so require, without subjecting it to conditions substantially different from those affecting the children attending the public schools. There is no discrimination. The legislature has the power to make such reasonable regulations as these with respect to the time of the vacation of schools, whether public or private, in the interest of the public welfare and the welfare of the children."

¹*Inland Steel Co. v. Yedinak* (1909) 172 Ind. 423, 139 Am. St. Rep. 389, 87 N. E. 229, transferred from the appellate court (1908) 42 Ind. App. 629, 86 N. E. 503.

²With reference to the contentions in this regard the court said: "Children under sixteen years of age are wards of the state, and are pre-eminently fit subjects for the protecting care of its police power. . . . The employment of children of tender years in mills and factories, not only endangers their lives and limbs, but hinders and dwarfs their growth and development physically, mentally, and morally. The state is vitally interested in its own preservation, and, looking to that end, must safeguard and protect the lives, persons, health, and morals of its future citizens. Acting upon this wise and humane principle, nearly all, if not all, other states of the Union, and most other enlightened governments of the world, have enacted laws very similar to our own, prohibiting the employment of young children in mines, factories, and other establishments imperiling their health, lives, and limbs, and at the same time affording them an opportunity to attend school, and to grow and develop in safe and wholesome surroundings, free from the cares which generally engross the attention of adults in this commercial age. The validity of such laws has seldom been challenged, and, so far as our research extends, never denied. The length to which the state may go in providing measures looking toward the physical, moral, and intellectual well-being of its helpless and dependent wards is a question of expedience and propriety which it is the province of the legislature to determine."

also that it violated the prohibition of the Indiana Constitution against class legislation.³

The California enactment which declares that no child under sixteen years of age shall work at any gainful occupation during the hours that the public schools are in session, unless such child can read English at sight and write simple English sentences, or is attending night school, and also provides that no minor under sixteen shall work in any mercantile institution, office, laundry, manufacturing establishment, or workshop, between 10 o'clock in the evening and 6 o'clock in the morning, has been pronounced valid.⁴ The exemption of domestic labor and the several kinds of farming from the operation of the act was held not to be an unreasonable discrimination.

F. ENACTMENTS MODIFYING THE COMMON-LAW LIABILITY OF AN EMPLOYER FOR INJURIES SUSTAINED BY HIS EMPLOYEES.

2840. Employers' liability acts modeled on that of England.—
(See chapter LXXIV., *ante*.)

a. Indiana.—The enactment by which, in certain classes of cases, the defense of common employment has been abolished in respect of actions brought against railroad or other corporations, except municipal, to recover for injuries sustained by servants, has been declared to be invalid in respect of private corporations, for the reason that it discriminates improperly against them.¹

³ As the Louisiana enactment reviewed in § 2838, note 8, *ante*, also included provisions limiting the hours of labor, the decision which upheld it against similar objections may be cited as being by implication an additional authority in the present point of view also.

⁴ *Re Spencer* (1906) 149 Cal. 396, 404, 117 Am. St. Rep. 137, 86 Pac. 896, 9 Ann. Cas. 1105 (Gen. Acts, act 1611, § 2). The court said: "The proviso concerning illiterate children is a reasonable regulation to prevent those having control of such children from working them to such an extent as to hinder them from acquiring, or endeavoring to acquire, at least the beginning of an education before arriving at the age of sixteen years."

¹ *Bedford Quarries Co. v. Rough* (1907) 168 Ind. 671, 14 L.R.A. (N.S.) 418, 80 N. E. 529, the court said:

"While the employer's liability act, so far as it affects private corporations, applies to all within the class named therein, it does not include all of the class to which it is naturally related. Employees of individuals and copartnerships are excluded from the benefit of its provisions. It gives a right of action to an employee for injuries received while in the service of a private corporation in certain cases, but denies the employee of an individual or copartnership, engaged in the same business, a right of action for an injury arising from the same cause and under the same conditions. It imposes new burdens on private corporations, while natural persons carrying on a like business and under like circumstances and conditions are left without any such burden. The right of action is made to depend upon the character of the employer, and not upon the character

As regards railroad corporations, it has been upheld against the objections (1) that it is in conflict with the clauses of the state Constitution which prohibit special legislation;² (2) that it deprives such corporations of their property without due process of law;³ and (3) that it violates the equality clause of the Federal and state Constitutions, in that it subjects such corporations, so far as the defense of common employment is concerned, to a rule different from that which prevails in respect of other occupations.⁴ The ground upon

of the employment. . . . The corporation, under our laws and industrial system, has in it the seeds of tremendous growth; but, as the real evil can be reached by a classification which goes to those elements which, to some extent, have removed the reason for the coservant rule, there is not even a color of an excuse for imposing burdens on the corporate employer, while its competitor, a natural person, who is carrying on a like business under the same conditions, is left without any such burden. If said corporations, as such, are to have legislative burdens put upon them, as by the law in controversy, then all who ought to be put in their class should be included, or, if this appears to the legislative mind as improper owing to differences in the character of employments, then legislation should have for its basis a classification which rests on such differences in the various employments as would make a distinction between them appear to be warranted."

The above decision was followed in *American Car & Foundry Co. v. Inzer* (1909) 172 Ind. 56, 87 N. E. 722; *American Car & Foundry Co. v. Applegate* (1908) 42 Ind. App. 342, 85 N. E. 724; *Standard Cement Co. v. Minor* (1908) 42 Ind. App. 231, 84 N. E. 353.

² *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery* (1898) 152 Ind. 1, 69 L.R.A. 875, 71 Am. St. Rep. 301, 49 N. E. 582. One of the two clauses relied upon was that which declares that the general assembly shall not pass local or special laws in certain cases, among which is specified the regulation of practice in courts of justice. The other prescribes that all laws shall be general and uniform throughout the state, where such a law can be made applicable. The court was of opinion that the question whether a general law can be made applicable to a partic-

ular case is for the legislature, and not for the court, to determine. For another statement to the same effect, see note to subs. (b), *infra*.

³ *Pittsburgh, C. C. & St. L. R. Co. v. Lighthouse* (1906) 168 Ind. 438, 78 N. E. 1033-1035.

⁴ The validity of the statute in this point of view was affirmed in *Tullis v. Lake Erie & W. R. Co.* (1899) 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136. The rejected contention of defendant's counsel was that the decisions sustaining the statutes of Kansas, Iowa, and Ohio (see chapter XXXIX., *post*) were not in point, since the Indiana statute classified railroad companies arbitrarily by name, and not with regard to the business in which they were engaged. This decision was followed in *Cincinnati, H. & D. R. Co. v. Thiebaud* (1900) 52 C. C. A. 538, 114 Fed. 918.

In *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery* (1898) 152 Ind. 1, 69 L.R.A. 875, 71 Am. St. Rep. 301, 49 N. E. 582 (brakeman injured by negligence of engineer), the court used the following language: "Objection is made to the validity of the act, because it embraces all corporations except municipal, and that there are other corporations whose business may be such as not to afford any reasonable ground for their classification, in that their business may not be peculiarly dangerous to life and limb, like that of railroads. To this it may be answered, if the act is valid as to railroad companies, the appellant, a railroad corporation, cannot be permitted to litigate the constitutionality of the act as to other corporations." As explained in *Pittsburgh, C. C. & St. L. R. Co. v. Lighthouse* (1906) 168 Ind. 438, 78 N. E. 1034, the essence of the position thus taken was that the act "was capable of severance, and thus, by putting railroads in a class by themselves, it might

which the last mentioned of these objections has been considered to be untenable is that the risks incident to the operation of railroads are sufficiently peculiar and abnormal in their character as to justify the legislature in making them the basis of a classification by which servants employed in railroads are segregated from those of other description.⁵ This conception is deemed by the supreme court of

be sustained as to railroads, regardless of its unconstitutionality as to other corporations." Discussing the objection that the act exempts municipal corporations from its purview, the court said: "No reason has been suggested why municipal corporations should be classed as railroad corporations. We have many statutes applying to railroad corporations that do not apply to municipal corporations. There is no necessary similarity between them. Nor is the business of municipal corporations so peculiarly hazardous to their employees as to call for such special legislation as is called for in case of railroad corporations to protect their employees."

For other cases affirming a similar doctrine, see *Pittsburgh, C. C. & St. L. R. Co. v. Hosea* (1898) 152 Ind. 412, 53 N. E. 419 (validity of the enactment as a whole, was affirmed in a case where the actual point involved was the validity of the clause prohibiting contracts releasing railroad companies from liability); *Pittsburgh, C. C. & St. L. R. Co. v. Collins* (1906) 168 Ind. 467, 80 N. E. 415 (brakeman injured by negligence of engineer); *Pittsburgh, C. C. & St. L. R. Co. v. Rogers* (1906) 168 Ind. 483, 81 N. E. 212 (servant struck by train); *Pittsburgh, C. C. & St. L. R. Co. v. Ross* (1907) 169 Ind. 3, 80 N. E. 845 (brakeman injured while making up a train); *Pittsburgh, C. C. & St. L. R. Co. v. Peck* (1909) 172 Ind. 19, 87 N. E. 644, transferred from App. Ct. (1909) 43 Ind. App. 316, 87 N. E. 153, and retransferred (1909) 44 Ind. App. 62, 88 N. E. 627, and cases cited in the following notes.

⁵In *Indianapolis Union R. Co. v. Houlihan* (1901) 157 Ind. 494, 54 L.R.A. 787, 60 N. E. 943 (telegraph operator run over by train, while crossing a track to receive reports of movements of trains), the court said: "It is competent for the legislature in the exercise of the police power to take steps for the protection of the lives and limbs

of all persons who may be exposed to dangerous agencies in the hands of others. The powerful forces in railroading that are under the direction and control of those in charge of 'any signal, telegraph office, switch yard, shop, roundhouse, locomotive engine, or train upon a railway' were proper to be selected as sources of unusual danger which should be guarded against; the object to be accomplished was to incite railroad companies to use the utmost diligence in the selection and supervision of their servants who are put in charge of these dangerous agencies, so that fewer lives and limbs of those who are entitled to claim the protection of our laws would be sacrificed. The legislature evidently considered that strangers and employees (the attorney and ticket seller, for example) who were not fellow servants of those in charge of the agencies named were sufficiently protected by the railroad companies' existing liability to them for the negligent operation of those dangerous agencies. The legislature evidently determined to protect all persons who were not already protected from the negligent use of particular instruments. The classification is made on the basis of the peculiar hazards in railroading, relates directly to the object to be accomplished, and applies equally to all employers within the class. To separate railroading from other business was not an unconstitutional discrimination, because the dangers (the basis of classification) do not arise from the same sources; but the claim that a classification not made on the basis of the dangerous agencies employed in the business, but founded on the question whether the employee, who was injured without his fault by a fellow servant's negligent use of a dangerous agency, was acting at the time on his own initiative in the line of his duty or under the orders of a superior, is the only constitutional classification, is unwar-

the state to involve the consequence that, in order to sustain the validity of the statute, it must be construed as being applicable only to servants whose work is such as to expose them to the hazards resulting from the operation and movement of trains and engines.⁶ This theory concerning its scope does not, however, import that it

ranted. A train is wrecked through the negligence of the engineer; two brakemen are injured without fault on their part,—one acting at the time in obedience to the conductor's orders, the other acting on his own initiative, within the line of his duty; there should be and there is no constitutional limitation upon the legislature's exercise of the police power by which a law may not be enacted to protect both brakemen equally from the negligence of the engineer."

"The classification of railroads by themselves was held proper . . . on account of the dangerous and hazardous character of the business of operating railroads. This classification is based not on the difference in employers, but upon a difference in the nature of the employment. . . . The spirit and purpose of said employer's liability act of this state, so far as railroads are concerned, was the protection of employees engaged in the dangerous and hazardous work of operating railroads in this state, and we hold that it applies to every corporation, company, co-partnership, or person engaged in the dangerous and hazardous business of operating a railroad, and their employees who are engaged in such dangerous and hazardous work." *Pittsburgh, C. C. & St. L. R. Co. v. Lighthouse* (1906) 168 Ind. 438, 78 N. E. 1034 (engineer run over by train).

⁶*Indianapolis Traction & Terminal Co. v. Kinney* (1908) 171 Ind. 612, 23 L.R.A.(N.S.) 711, 85 N. E. 954 (trackman on street railway was injured, while unloading rails). The court said: "The constitutionality of the employer's liability act is upheld on the ground that the inclusion of railroads only is a proper classification, because it relates to the peculiar hazards inherent in the use and operation of railroads, and refers to the character of the employment, and not to the employer. . . . The peculiar and superlative dangers to which employees are necessarily exposed in the running of trains

form the basis of such classification, and it is not, therefore, material whether the employer in railroad service is a corporation, partnership, or an individual. . . . To separate railroading from all other kinds of business is not an unconstitutional discrimination, because no other business is beset with so many and severe dangers as those encountered by employees, in preparing for and during the movement and operation of railroad trains. . . . Notwithstanding the language of the statute is 'that every railroad, or other corporation, except municipal, operating in this state, shall be liable for damages for personal injury suffered by any employee while in its service,' it must not for a moment be understood that the benefits of the statute are extended to all employees of a railroad corporation, or to any other class of employees than those whose duties expose them to the peculiar hazards incident to the use and operation of railroads. There is no reason, in fact or fancy, why the benefits of the statute should be extended to the office and shop employees of railroad corporations, or to others removed from the dangers of train service, and denied to the multitude of other workmen engaged in business of like and equal hazard. . . . By this we do not mean that it is essential to the bringing of an employee within the statute that he should be connected in some way with the movement of trains, but it seems sufficient if the performance of his duties brings him into a situation where he is, without fault, exposed to the dangers and perils flowing from such operation and movement and is by reason thereof injured by the negligence of a fellow servant described in the act."

The above decision was followed in *Cleveland, C. C. & St. L. R. Co. v. Fo-lan* (1910) 174 Ind. 411, 91 N. E. 594, 92 N. E. 165 (where the right of action denied in a case where piling fell on plaintiff).

enures to the benefit only of those descriptions of servants who are engaged in the actual operation of trains.⁷

⁷ *Richey v. Cleveland, C. C. & St. L. R. Co.* (1911) — Ind. —, — L.R.A. (N.S.) —, 96 N. E. 694 (action under the statute held to be maintainable, where a section man traveling on a hand car was injured by its sudden stoppage). The court having pointed out that in *Indianapolis Street R. Co. v. Kane* (1907) 169 Ind. 25, 80 N. E. 841, 81 N. E. 721, the question whether a bridge carpenter came within the act was not raised or discussed, both parties having assumed that he did, continued thus: "The rule is too broadly stated in the *Kinney Case* and in the *Foland Case* . . . [see preceding note] if it is understood as limiting liability to those engaged in train service, but we do not so understand those cases, or so intend to hold, or limit it, but that it applies to the hazards of the operation of railroad engines and trains. Bearing in mind that the ground for the classification is the character of the employment from which the hazards arise, and it may be that in a specific case a workman upon the tracks is subject to the hazards peculiar to the running of trains themselves, from collision, derailment, falling or projecting materials, or from other causes where employment on or about the track or on or about bridges is affected by their operation, or in movements on the track and affected by their operation in necessary work upon it. At least it cannot be said as a matter of law that there is no hazard from the operation of trains, in working upon the track, or where operation of trains produces hazard, nor even that it is a less hazard than direct operation of trains." The opinion was expressed that in *Louisville & N. R. Co. v. Melton* (1910) 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. Rep. 676 (see next note) language was used, "which, whilst properly involved in the Federal question as to equal protection and due process of law clauses of the 14th Amendment, was not, in our judgment, sufficiently guarded in view of the rule in the *Tullis Case* [see note 4, *supra*] and of the construction by this court of the act in its relation to our own Constitution. An examination of the case discloses that the sole question before the court was as to the constitutionality of the act as applied to

the 14th Amendment to the Federal Constitution; and that this is so appears not only from the opinion itself, but from views expressed in the late case of *Mobile, J. & K. C. R. Co. v. Turnipseed* (1910) 219 U. S. 35, 55 L. ed. 78, 32 L.R.A. (N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912 A, 463 [see § 2844, note 15, *post*]. Incidentally, it will be noticed that, while the question of the full faith and credit clause of the Federal Constitution was sought to be invoked in that case as binding upon the courts of Kentucky, by the construction placed upon our statute, the court expressly declines to consider the question, because it was in no wise presented to the Kentucky court of appeals, and it of course follows that it was not determined in that case, the only question conferring jurisdiction upon the Supreme Court was the question involving the 14th Amendment, which, as we understand it, was the only question before the court, in the discussion of which the court refers to the construction put upon the statute by this court as too restricted. . . . If, as seems to be the case, the Supreme Court in the *Melton Case* regards the construction by this court as too restricted, with respect to the character of employees, as restricted to those in train service we agree with it; but we do not so understand the rule, but understand and hold that it should be drawn at those who incur the hazard of an injury by and from the operation of trains; but we cannot go further without offending the prohibition of our own Constitution against special and class legislation. To adopt the broad construction apparently given in *Louisville & N. R. Co. v. Melton* (1907) 127 Ky. 276, 105 S. W. 366, 110 S. W. 233, 112 S. W. 618, and followed on appeal to the Supreme Court of the United States, could but lead to the entire overthrow of the act, but it seems to us that there is a line of possible harmony in the cases, on principles, though it could not harmonize our views with the rule adopted by the supreme court of appeals of Kentucky in the *Melton Case*, as applying to a bridge carpenter, whose injury was in no wise caused by or connected with the hazard of operating trains, or different from that

The Supreme Court of the United States, on the other hand, has taken the position that the enactment is valid as regards servants engaged in other descriptions of work also.⁸ Having regard to the

in any other business of a like character. The distinction, it seems to us, lies not from the general inclusion of employees in a class, owing to the impracticability, if not the impossibility, of enacting a statute which would in and of itself apply to every condition or character of modern employments it may be sought to apply it to, but in the application of the statute in a particular case, irrespective of the general classification, to those whose employment for the time being exposes them to the hazards of, and injury from, the operation of trains."

⁸ In *Louisville & N. R. Co. v. Melton* (1910) 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. Rep. 676, affirming (1907) 127 Ky. 276, 105 S. W. 366, 110 S. W. 233, 112 S. W. 618, where a decision of the Kentucky court of appeals, holding bridge carpenter to be entitled to recover under the Indiana act for injuries caused by the fall of a bent of a coal tippie, was sustained, the court said: "The argument is that classification of railroad employees for the purpose of the doctrine of fellow servant can only, consistently with equality and uniformity, embrace such employees when exposed to dangers peculiarly resulting from the operation of a railroad, thus affording ground for distinguishing them for the purpose of classification from coemployees not subject to like hazards or employees engaged in other occupations. . . . The idea evidently intended to be expressed by the argument is that although, speaking in a general sense, it be true that the hazards arising from the operation of railroads are such that a classification of railroad employees is justified, yet as in operating railroads some employees are subject to risks peculiar to such operation and others to risks which, however serious they may be, are not in the proper sense risks arising from the fact that the employees are engaged in railroad work, the legislative authority in classifying may not confound the two by considering in a generic sense the nature and character of the work performed by railroad employees collectively considered, but must consider and separately provide for the distinctions

occasioned by the varying nature and character of the duties which railroad operatives may be called upon to discharge. In other words, reduced to its ultimate analysis, the contention comes to this, that by the operation of the equal protection clause of the 14th Amendment the states are prohibited from exerting their legitimate police powers upon grounds of the generic distinction obtaining between persons and things however apparent such distinction may be, but, on the contrary, must legislate upon the basis of a minute consideration of the distinctions which may arise from accidental circumstances as to the persons and things coming within the general class provided for. When the proposition is thus accurately fixed, it necessarily results that in effect it denies the existence of the power to classify, and hence must rest upon the assumption that the equal protection clause of the 14th Amendment has a scope and effect upon the lawful authority of the states contrary to the doctrine maintained by this court without deviation. This follows, since the necessary consequence of the argument is to virtually challenge the legislative power to classify and the numerous decisions upholding that authority. To this destructive end it is apparent the argument must come, since it assumes that, however completely a classification must be justified by general considerations, such classification may not be made if inequalities be detected as to some persons embraced within the general class by a critical analysis of the relation of the persons or things otherwise embraced within the general class. A brief reference to some of the cases dealing with the power of a state to classify will make the error of the contention apparent. . . . And coming to consider the concrete application made of these general principles in the decisions of this court which have construed the statute here in question, the statutes of the same general character enacted in the states other than Indiana, we think when rightly analyzed it will appear they are decisive against the contention now made. It is true that in the *Tullis Case*, which came

purport and rationale of the decision in the case cited, it is not quite apparent why this court should, in a subsequent case, content itself with a ruling which merely goes to the extent of declaring that, in view of the construction placed upon the enactment by the state courts, there was no force in a contention that the enactment "violates the 14th Amendment, because, upon its face, it applies to 'any employee,' thereby embracing in one classification those employees subjected to the hazards incidental to the actual operation of railway trains with those in other branches of the service not so subjected, and therefore not within the reason for the classification."⁹ It would seem that such a contention might well have been rejected simply on the ground that it raised a point which the reasoning of the earlier case had rendered entirely immaterial. It is observable, however, that the opinion contains the saving statement: "We do not intimate that the act, if construed as applicable to all employees of a railroad company, would be in contravention to that clause" (*i. e.*, "equal protection").

In a case where the injured servant had been in the defendant's service for several years before and after the statute was passed, but there was no evidence that he had been engaged under a definitive agreement with regard to the future, it was held that the statute was not objectionable as impairing the obligation of a contract.¹⁰

b. New Jersey.—It has been held that the employers' liability act

here on certificate, the nature and character of the work of the railroad employee who was injured was not stated, and that reference in the course of the opinion was made to some state cases, limiting the right to classify to employees engaged in the movement of trains. But that it was not the intention of the court to thereby intimate that a classification, if not so restricted, would be repugnant to the equal protection clause of the 14th Amendment, will be made clear by observing that the previous case of *Chicago, K. & W. R. Co. v. Pontius* (1895) 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585, was cited approvingly, in which, under a statute of Kansas classifying railroad employees, recovery was allowed to a bridge carpenter employed by the railroad company, who was injured while attempting to load timber on a car." (For a criticism of the reasoning of the

Federal court by the supreme court of Indiana, see preceding note.) The rationale of the affirmed Kentucky judgment is indicated by the following remark by the court: "Bridges cannot be built without carpenters. The work of a bridge carpenter on a railroad is perhaps no less perilous than the work of an operative on a train. Coal tipples are no less essential to the operating of a railroad than bridges, because engines cannot be operated without coal. The construction of the coal tipple is therefore essential to the operating of a railroad."

⁹ *Chicago, I. & L. R. Co. v. Hackett* (1912 Oct. Term) 228 U. S. 559, 57 L. ed. —, 33 Sup. Ct. Rep. 581 (switchman injured through the negligence of yard fireman).

¹⁰ *Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser* (1906) 168 Ind. 438, 78 N. E. 1033.

is not invalid, as contravening the provision of the state's Constitution which forbids special legislation.¹¹

c. New York.—The amendment to the general railroad law of this state, by which it is enacted that in all actions by a servant against a railroad corporation, or a receiver thereof, for personal injury, or

¹¹ *Quigley v. Lehigh Valley R. Co.* (1911) 80 N. J. L. 486, 79 Atl. 458. The court said: "The point of the insistence is that the act is special, and not general; and this is claimed to result from the fact that the act does not apply to all employers of labor, and especially because the third paragraph of § 1 selects railroad companies from the general mass of employers, and imposes liability upon them alone. Assuming the act to be special, it would seem, from the language of the Constitution, that the question whether the matters dealt with therein are susceptible of being regulated by a general law, is one for the judgment of the legislature rather than of the courts. It is not necessary, however, to decide this point, for the assumption is not, we think, well founded; that is to say, we consider the law general, not special. The power of the legislature under this constitutional provision to pass laws applying only to a class of persons or objects has been declared so often by our courts that a citation of authority would be superfluous. Such laws are general when they embrace all and exclude none whose condition and wants render the legislation equally necessary or appropriate to them. That railroad corporations and railroad property may be segregated for the purpose of legislation; that they each constitute a legitimate class for such purpose; and that legislation which deals solely with the one or the other is general, not special, is equally well settled." It was remarked that the general railroad law "contains provisions limiting liability which exists outside the statute, and in this respect makes railroad companies a favored class," and yet it had "never even been suggested that these provisions operate to specialize the statute." The court then proceeded as follows: "If the legislature, in addition to the liabilities which it created, had seen fit to embody in the act provisions similar to those contained in the statute now under consideration, creating liabilities against railroad corporations for the benefit of

their employees, on what theory could such an addendum be declared to work a fundamental change in the character of the act and render special that which otherwise would be general? We can conceive of none, and are clear that with such an addition the act would still remain a general law. And if such a provision, ingrafted in the body of the act, would not operate to render it special, a supplement to the act embodying this provision would also be general legislation; for an act and its supplements are to be read together, and if the supplement does not operate to render the statute, as amended, special, it is valid legislation. *Central R. Co. v. State Assessors* (1907) 75 N. J. L. 771, 69 Atl. 239. Moreover, if provisions creating liability against railroad companies do not operate to render 'an act concerning railroads' special, it must be because such provisions, although made applicable to such class alone, are in essence general legislation, for it cannot logically be, we think, that an act which is special in some of its parts is general as a whole. If this be so, then it follows that an independent enactment which imposes liability upon railroad companies for injuries received by employees while engaged in their service is not special in its character. The employers' liability law, however, is not limited in its scope to railroad companies. It applies also to all employers who have a place in which their employees perform the tasks allotted to them; to all employers who have works, machinery, or a plant connected with or used in the business which they carry on; to all employers who have in their service a person intrusted with the duty of superintendence over the work to be done and over the employees engaged in doing it. But when a law which deals with a certain class of objects is general, it will not be rendered special by an enlargement of the class; or, to put it more accurately, by enlarging its scope so as to embrace another class or other classes."

death resulting from personal injury, arising from its negligence or that of any of its officers or employees, it shall be held that persons in the service of the corporation, who are intrusted with the authority to direct any other employee, or who have as a part of their duty for the time being physical control or direction of the movement of a signal, switch, locomotive engine, car, train, or telegraph office, are vice principals of such corporation, has been pronounced constitutional for the reason that such a provision is "clearly a matter of state control."¹²

2841. Enactments modifying the doctrine of common employment as regards the servants of all classes of employers.—The Colorado statute which, in general terms, declares all employers to be liable to their servants for injuries caused by the negligence of other servants has been pronounced valid against the objection, that "the imposition of this liability upon an employer, without taking into consideration the nature of the business or the manner of carrying it on, works a great hardship and injustice upon employers, and deprives them of a defense which the common law gives them, without permitting them to be heard on the subject of their own wrong or negligence."¹

2842. —as regards the servants of all carriers.—The South Dakota enactment which renders every common carrier liable to his servants for injuries caused by the negligence of other servants has been held invalid, as denying the equal protection of the laws.¹ In the case cited the opinion was also expressed that the enactment could

¹² *Schardin v. New York C. & H. R. Co.* (1909) 194 N. Y. 534, 87 N. E. 1126 (mem.), affirming (1908) 124 App. Div. 705, 109 N. Y. Supp. 428, which affirmed (1907) 103 N. Y. Supp. 73. This ruling was followed in *Inglese v. New York, N. H. & H. R. Co.* (1909) 133 App. Div. 198; 117 N. Y. Supp. 392; *Vroom v. New York C. & H. R. Co.* (1909) 129 App. Div. 858, 115 N. Y. Supp. 1063, affirmed in (1910) 197 N. Y. 588, 91 N. E. 1121 (Mem.).

¹ *Vindicator Consol. Gold Min. Co. v. Firstbrook* (1906) 36 Colo. 498, 86 Pac. 313, 10 Ann. Cas. 1108 (for statutes, see § 1770, ante). Referring to the common-law rule, the court said: "The act is not objectionable because it changes it. A person has no property or vested interest in any rule of the common law. That is one of the forms of municipal law, and is no more sacred than any other.—*Munn v. Illinois* (1876) 94 U. S. 113, 134, 24 L. ed. 77, 87. That the

act in question may be regarded by some as harsh or unjust, because imposing too great a liability, is not a matter which we can consider in determining its validity by constitutional tests. Whether or not the employer is liable under the act in question must be determined by each particular case based on the provisions of that act. It does not deprive him of any defense to the liability thereby imposed which, under the established rules of law, could be regarded as sufficient, save and except his own lack of negligence; but such a defense is not a constitutional right."

¹ *Chicago, M. & St. P. R. Co. v. Westby* (1910) — L.R.A.(N.S.) —, 102 C. C. A. 65, 178 Fed. 619 (S. D. Laws 1907, chap. 219). The court said: "The subject-matter of the statute is the liability of masters for injuries to their servants caused by the negligence of their fellow servants and for those to which their own negligence contributes. There is a

not be validated by a construction which should limit its purview to railroad companies or to common carriers and their employees engaged in dangerous occupations.²

sound and natural reason why railroad companies should be liable, while other employers are not, for the injuries of their servants engaged in the operations of their engines and trains, and in the construction and repair of tracks and roadbeds on which engines and trains are in operation, and in any other like hazardous occupations, although those injuries are incurred by the negligence of fellow servants. It is that the occupation of these servants is more hazardous and more dangerous than that of servants in ordinary occupations, and that the fellow servants on whose care their safety largely depends are so numerous and many of them are so distant from them in place or in work that they have little, if any, opportunity to learn their characters for care and prudence. If the act under consideration limited its beneficiaries to servants of this class, it might escape the ban of the Constitution and be sustained. But it confers its causes of action upon all the servants of all common carriers, whether these servants are engaged in dangerous or in comparatively safe occupations, whether they are driving engines, operating trains, and repairing railroad tracks, or making tariffs, keeping books, trying lawsuits, conducting or driving street cars or stagecoaches or cabs or omnibuses or wagons, loading and unloading drays or trucks, or operating a telegraph or a telephone or an express business, so that the danger of their occupations utterly fails to distinguish their situation and circumstances from those of the servants of other masters, some of whom, like the servants in this legislative class, have dangerous and others comparatively safe occupations. . . . Illustrations might be multiplied indefinitely: but these seem to be ample to show that this statute denies the equal protection of the law to persons in the same situations and circumstances relative to the subject-matter of this legislation. There is no reason of necessity or propriety—there is no reason whatever that occurs to us—why a common carrier should be subjected to liability to his bookkeeper, or to his clerk in his general offices, or to his driver or loader

of his dray or truck, or to any other of his servants who is not actually engaged in some such hazardous occupation as operating engines or trains, or handling or working about machinery, while the merchant, the manufacturer, and all other persons are exempt from such liabilities to their servants engaged in the performance of the same work under the same circumstances. And there is no just reason—nay, there is no reason whatever that we can ascertain—why such servants of common carriers who are not engaged in any dangerous or hazardous occupation should be granted the right and privilege of recoveries from their masters for damages caused by the negligence of their fellow servants which their own negligence contributed to cause, while the servants of other persons doing the same work in the same situation and circumstances are denied this right and privilege. The discrimination which this statute works violates the indispensable conditions of a constitutional classification. There is no difference between the situation and circumstances of all the members of the class which the statute forms and those of all other masters and servants in the state relative to the subject-matter of this legislation, that presents any natural or sound or just reason of necessity or propriety for the difference in their liabilities and rights it attempts to make, and it does not bring under its influence all masters and servants who are in a situation and in circumstances relative to its subject-matter indistinguishable from those of members of the class.”

² The court said (p. 631): “The act . . . expressly includes within the same general term ‘every common carrier engaged in trade or commerce in the state of South Dakota shall be liable to any of its employees, or in case of his death to his personal representatives,’ carriers and employees in the constitutional and those in the unconstitutional class, those engaged in hazardous and dangerous, and those employed in comparatively safe, occupations. The part of the statute applicable to the former class cannot be separated from

2843. —as regards the servants of all corporations.—*a. Arkansas.*—

The statute which abrogates the doctrine of common employment as regards railroad companies, all corporations of every kind, and every company, whether incorporated or not, engaged in the mining of coal, has been upheld by the supreme court of the state, with respect to a domestic corporation engaged in the lumber business, on the ground that it was a reasonable exercise of the reserved right of the legislature to amend the company's charter.¹ In a later case the same ruling was made by that court in regard to a foreign corporation which was operating a railroad.² The Federal Supreme court, to which an appeal was taken, declined to express any definite opinion concerning the applicability of the principle thus invoked to foreign corporations, or concerning the general question raised by the contention of counsel that the statute was discriminatory in that it included all corporations, and not individuals or partnerships. The judgment of the state court was affirmed for the reason that the statute made a distinction between railroads operating in the state and individuals; that this distinction had been upheld by the Federal Supreme Court as not offending against the Constitution of the United States; and that the company in question, being engaged in operating a railroad, was not in a position to raise the question of an unlawful discrimi-

that applicable to the latter class, so that each may be read and may stand by itself, because both classes are embodied in the general words 'every common carrier' and 'employee,' and are included in a single declaration. . . . The statute cannot be restricted lawfully by construction to the constitutional class because the part applicable to that class is not separable from the part applicable to the unconstitutional class so that each may be read and may stand by itself, because it is not apparent that the legislature would have passed the act if it had been limited to the constitutional class, because the legislature excepted neither class, and the legal presumption is that it intended to except none, and because the statute cannot be restricted to the constitutional class by the elimination of words or clauses; but this result can be attained only by the introduction into it of express words or terms."

Compare the position taken by the majority of the court in the *Employer's Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, § 2798, *ante*.

¹ *Ozan Lumber Co. v. Biddie* (1908) 87 Ark. 587, 113 S. W. 796. (Act of March 8, 1907). The court said: "Why should not the employer suffer the consequences resulting from the negligence of his employee, instead of the employee who is injured by such negligence? The employee has no control over his fellow servant, did not employ him, and cannot discharge him. The employer employs, can control and discharge him. The act does not make him liable for such damages unless the employee is at the time in the exercise of due care. Acts of legislatures imposing such liability on railroad companies have been upheld by the courts on account of the hazardous character of the business of operating a railway. The only difference in the reason for such acts and the act in question is that danger of the service of railroads is greater than that of other corporations; a difference in degree, and not in kind. We think the act in question is constitutional as to corporations."

² *Aluminum Co. v. Ramsey* (1909) 89 Ark. 522, 117 S. W. 568.

nation by "appropriating the grievance that corporation engaged in mining, but not operating railroads, might have on account of the distinction made between them and individuals." ³

b. Mississippi.—The enactment which provided that an injured servant of a corporation should be entitled to the same remedial rights as a stranger, where his injury resulted from the negligence of "a superior agent or officer, or of a person having the right to control" him, or of a fellow servant, in another department of labor, was invalidated on the ground that it denied corporations the equal protection of the laws in that it imposed restrictions to which natural persons were not subject upon all corporations, without any relation to differences arising out of the nature of their business. ⁴ The proposition that it could be sustained by construing it as being applicable only to corporations engaged in hazardous kinds of business, and by permitting the court in each case to determine from the evidence whether the particular business involved was hazardous, was held to be untenable.

2844. —as regards the servants of railroad corporations.—*a. Florida.*—The enactment which provides in effect that, in an action brought against a railroad company for an injury to person or property, the facts that the injured person is an employee of the company, and that the damages were caused by the negligence of another employee, shall be no bar to recovery, has been sustained against the objections that it denies the companies the equal protection of the laws, and that it deprives them of their property without due process of law. ¹

b. Georgia.—The validity of the Georgia enactment which imposes upon railroad companies a liability for injuries inflicted upon

³ *Aluminum Co. v. Ramsey* (1911) 222 U. S. 251, 254, 56 L. ed. 185, 188, 32 Sup. Ct. Rep. 76.

⁴ *Ballard v. Mississippi Cotton Oil Co.* (1903) 81 Miss. 507, 62 L.R.A. 407, 95 Am. St. Rep. 476, 34 So. 533 (Laws 1898, chap. 66, § 1, extending to all corporations the remedies accorded by the earlier enactment to servants of railroad corporations. See § 2483, *ante*). The doctrine laid down in this case was reiterated in *Yazoo & M. Valley R. Co. v. Schraag* (1904) 84 Miss. 125, 36 So. 193, and *Bradford Constr. Co. v. Heflin* (1906) 88 Miss. 314, 12 L.R.A. (N.S.) 1040, 42 So. 174, 8 Ann. Cas. 1077.

¹ *Florida East Coast R. Co. v. Lassit-*

er (1909) 58 Fla. 234, 50 So. 428, 19 Ann. Cas. 192.

It is within the province of the legislature to modify the common-law rules regulating employers' liability, and a wide discretion is accorded it in determining the subjects as well as the character and extent of regulations designed to promote the general welfare; the limitations imposed by the Federal Constitution being designed merely to prevent arbitrary abuses of state authority. *Taylor v. Prairie Pebble Phosphate Co.* (1911) 61 Fla. 455, 54 So. 904.

The constitutionality of the provision was also recognized in *Atlantic Coast Line R. Co. v. Beazley* (1908) 54 Fla. 311, 45 So. 761.

one of their servants through the negligence of another has been impugned on the ground that it is class legislation. But this objection has been declared to be unfounded, for the reasons that the law deals with "persons engaged in a peculiar and dangerous occupation, standing in peculiar relations to the principal, their fellow employees, and to the public,"² and that it is applicable to all railway companies alike.³ The contention that the statute is repugnant to the 14th Amendment of the United States Constitution has also been rejected.⁴

c. Iowa.—The earliest enactment which provided that every railroad company should be liable for all damages sustained by any person in consequence of any neglect of the agents, or by any mismanagement of the engineer or other employee of the corporation, to any person sustaining such damage, was held not to violate the clause of the state Constitution which requires that "all laws shall be general and of uniform operation."⁵

In the case cited the fact that the parties affected were railroad companies and their employees was regarded as affording of itself a sufficient basis for a classification excluding other descriptions of em-

²In *Georgia R. & Bkg. Co. v. Oaks* (1874) 52 Ga. 410, the court said: "The legislation does not relate to the railroad companies because they are such, but because of the peculiar and special nature of their business. The law for this reason gives them special privileges,—they are specially protected from trespassers; their employees are exempted from various public duties; etc., etc. It might, with just as much force, be said that laws as to carriers, brokers, warehousemen, mechanics, laborers, etc., etc., vary the general laws by special legislation. The law is general; it applies to all railroad companies and to all employees engaged in running trains."

³In *Georgia R. Co. v. Ivey* (1884) 73 Ga. 499, the court said: "It would be more special and less general, if applicable only to those engaged in running trains. It is a general law, embracing in its terms all railroads and their employees. Nor is it a special law affecting private rights, which varied a general law without the free consent in writing of all persons to be affected thereby," in the sense of this language in our Constitution. It would be so if it affected one railroad company

without such consent, and left out all others. But this affects all railroad companies and their employees. It might as well be said that a law affecting all lawyers or doctors was special legislation, if it regulated their treatment of clerks or students differently from that of common or unprofessional people. The cases cited from the Iowa reports are not in point. The Constitution and statutes there are unlike ours. If that court had so construed a statute like ours, we should differ with them, with all deference to their judgment; but they do not collide, we think, with what we decide on our Constitution and statutes."

⁴*Georgia R. & Bkg. Co. v. Miller* (1892) 90 Ga. 571, 16 S. E. 939, following *Missouri P. R. Co. v. Mackey* (1888) 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161 (note 9, *infra*); *Washington v. Atlantic Coast Line R. Co.* (1911), 136 Ga. 638, 38 L.R.A. (N.S.) 867, 71 S. E. 1066 (see § 2859, note 3, *post*).

⁵*McAunich v. Mississippi & M. R. Co.* (1866) 20 Iowa, 338. The *ratio decidendi* was that "the same liability is extended by the act, upon the same terms, to all in the same situation."

ployers. But the position was subsequently taken that, in order to sustain the statute, it must be construed as being applicable solely to servants exposed to the peculiar perils which are incident to operating trains.⁶

The legislature seems to have intended to give effect to this theory in the amended form of the enactment, which predicates liability in respect of torts committed by employees in respect of the use and operation of the road.⁷ This statute has been sustained against the objection that it is an improper interference with the right of contract⁸ and that it violates the 14th Amendment of the Federal Constitution.^{8a}

⁶ In *Deppe v. Chicago, R. I. & P. R. Co.* (1872) 36 Iowa, 52 (laborer injured by the fall of a bank of earth while he was helping to load a dirt train was held to be entitled to recover), the court said: "If the statute should be so construed as to apply to all persons in the employ of railroad corporations, without regard to the business they were employed in, then it would be a clear case of class legislation, and would not apply upon the same terms to all in the same situation, and hence would be unconstitutional, and manifestly so. To illustrate: Suppose a railroad company employ several persons to cut the timber on its right of way where it is about to extend its road, and the land-owner employs a like number of persons to cut the timber on a strip of equal length alongside such right of way. If one of each set of employees shall be injured by the negligence of a co-employee, and the employee of the railroad company can, under the statute, maintain an action against his employer, and the other cannot, then it is clear that the law does not apply upon the same terms to all in the same situation. The law, then, would not have uniform operation, but would be violative of the Constitution, just as much as a law that should prescribe under the same circumstances different liabilities for merchants, for mechanics, and for laborers. The manifest purpose of the statute was to give its benefits to employees engaged in the hazardous business of operating railroads. When thus limited it is constitutional; when extended further it becomes unconstitutional." This decision was cited with approval in *Foley v. Chicago, R. I. & P. R. Co.* (1884) 64 Iowa, 644, 21 N. W. 124, 14

Am. Neg. Cas. 630 (car repairers not within statute).

⁷ In *Bucklew v. Central Iowa R. Co.* (1884) 64 Iowa, 603, 21 N. W. 103, the court said: "The argument, briefly stated, is that under the statute, railroad corporations are subjected to penalties and liabilities which other persons and corporations engaged in a like business are not subjected to. That the business of operating a railway is peculiarly hazardous to employees engaged in the operation of the road must be admitted. Counsel have not called our attention to any business which is equally hazardous, and as the statute is applicable to all corporations or persons engaged in operating railroads, it seems to us it does not discriminate in favor of or against anyone. . . . The provisions of § 30 of article 3 of the Constitution of this state, and the 14th Amendment to the Constitution of the United States, are quite similar, if not in spirit identical, in so far as either can be said to prohibit the legislature from conferring excessive privileges on any person, or imposing penalties upon any corporation, which are not shared by others under like circumstances."

For other cases proceeding upon the same theory, see *Pierce v. Central Iowa R. Co.* (1887) 73 Iowa, 140, 34 N. W. 783; *Rayburn v. Central Iowa R. Co.* (1888) 74 Iowa, 637, 35 N. W. 606, 38 N. W. 520.

⁸ *Mumford v. Chicago, R. I. & P. R. Co.* (1905) 128 Iowa, 685, 104 N. W. 1135.

^{8a} *Chicago, B. & Q. R. Co. v. McGuire* (1910) 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259, affirming (1906) 131 Iowa, 340, 33 L.R.A.(N.S.) 706, 108 N. W. 902. As to this case, see further in § 2859, note 4, *post*.

d. Kansas.—In the case cited below it was held by the Supreme Court of the United States that the enactment which renders every railroad company liable for damages done to any employee in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, is not invalid either as denying the equal protection of the laws,⁹ or as taking their property without due process of law.¹⁰

⁹ *Missouri P. R. Co. v. Mackey* (1887) 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161. The court said: "[This objection] . . . seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be obtained by it, or in the extent of its application. Laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas, and other arrangements for the safety and convenience of their inhabitants, and laws for the irrigation and drainage of particular lands, for the construction of levees and the bridging of navigable rivers, are instances of this kind. Such legislation does not infringe upon the clause of the 14th Amendment requiring equal protection of the laws, because it is special in its character; if in conflict at all with that clause, it must be on other grounds. And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions. A law giving to mechanics a lien on buildings constructed or repaired by them, for the amount of their work, and a law requiring railroad corporations to erect and maintain fences along their roads, separating them from land of adjoining proprietors, so as to keep cattle off their tracks, are instances of this kind. Such legislation is not obnoxious to the last clause of the 14th Amendment, if all persons subject to it are treated alike under similar circumstances and conditions, in respect both of the privileges conferred and the liabilities imposed. It is conceded that corporations are persons within the

meaning of the amendment. *Santa Clara County v. Southern P. R. Co.* (1885) 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 132; *Pembina Consol. Silver Min. & Mill Co. v. Pennsylvania* (1887) 125 U. S. 187, 31 L. ed. 653, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737. But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. As said by the court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stagecoaches, and to persons and corporations using steam in manufactories." The decision of the state court in (1885) 33 Kan. 298, 6 Pac. 291, was accordingly affirmed. To the same effect, see *Missouri P. R. Co. v. Haley* (1881) 25 Kan. 35; *Atchison, T. & S. F. R. Co. v. Koehler* (1887) 37 Kan. 463, 15 Pac. 567.

¹⁰ Under this head the court argued thus: "The contention of the company, as we understand it, is that that law [*i. e.*, of Kansas] imposes upon railroad companies a liability not previously existing, in the enforcement of which their property may be taken; and thus authorizes, in such cases, the taking of property without due process of law, in violation of the 14th Amendment. The plain answer to this contention is that the liability imposed by the law of 1874 arises only for injuries subsequently committed; it has no application to past injuries, and it cannot be successfully contended that the state may not pre-

In a later case, where the injured servant was a bridge carpenter, it was contended before the same court "that the legislation only applied to employees exposed to the peculiar hazards incident to the use and operation of railroads; that the railroad company could not be subjected to any great liability to its employees who were engaged in building its bridges than any other private individual or corporation engaged in the same business; and that the statute had been so construed in this case as to make the company liable to its employees when engaged in building its bridges, notwithstanding bridge building was not accompanied, and had not been treated by legislation as accompanied, by peculiar perils, thus discriminating against the particular corporation irrespective of the character of the employment, in contravention of the 14th Amendment."^{10a} The court did not express any opinion concerning the soundness of the general theory upon which this argument was based, and contented itself with affirming the judgment in favor of the servant on the ground that "he was engaged at the time the accident occurred, not in building a bridge, but in loading timbers on a car for transportation over the line of defendant's road." But its more recent rulings are distinctly adverse to that theory.¹¹

e. Minnesota.—The enactment which provides that every railroad corporation shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or

scribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters. Legislation to this effect is found in the statute books of every state. The hardship or injustice of the law of Kansas of 1874, if there be any, must be relieved by legislative enactment. The only question for our examination, as the law of 1874 is presented to us in this case, is whether it is in conflict with clauses of the 14th Amendment. The supposed hardship and injustice consist in imputing liability to the company where no personal wrong or negligence is chargeable to it or to its directors. But the same hardship and injustice, if there be any, exist when the company, without any wrong or negligence on its part, is charged for injuries to passengers. Whatever care and precaution may be taken in conducting its business or in selecting its servants, if injury happen to the passengers from the negligence or incom-

petency of the servants, responsibility therefore at once attaches to it. The utmost care on its part will not relieve it from liability, if the passenger injured be himself free from contributory negligence. The law of 1874 extends this doctrine and fixes a like liability upon railroad companies, where injuries are subsequently suffered by employees, though it may be by the negligence or incompetency of a fellow servant in the same general employment, and acting under the same immediate direction. That its passage was within the competency of the legislature we have no doubt."

^{10a} *Chicago, K. & W. R. Co. v. Pontius* (1895) 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585.

¹¹ See *Louisville & N. R. Co. v. Melton* (1910) 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. Rep. 676 (see § 2840, note 8), and *Mobile, J. & K. C. R. Co. v. Turnipseed* (1910) 219 U. S. 35, 55 L. ed. 78, 32 L.R.A.(N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912 A, 463 (see note 17, *infra*).

servant has been upheld by the Federal Supreme Court against the same objection that has been advanced to the validity of the Kansas statute.¹² The supreme court of the state has declared its constitutionality to be predicable solely on the supposition that only servants whose work exposes them to the peculiar hazards which are incident to the operation of the road are within its application.¹³

¹² The doctrine laid down in the *Mackey Case*, note, 9, *supra*, was treated as the law of the case. *Minneapolis & St. L. R. Co. v. Herrick* (1887) 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176, affirming (1883) 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413.

¹³ In *Lavalley v. St. Paul, M. & M. R. Co.* (1889) 40 Minn. 249, 41 N. W. 974, the court, applying the doctrine formulated in *Nichols v. Walter* (1887) 37 Minn. 264, 33 N. W. 800, where it was laid down that, in order to exempt a statute from the imputation of being class legislation, the distinctions which it creates must be based upon some apparent natural reason,—some reason suggested by necessity,—by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them,—argued thus: "It is impossible to avoid the conclusion that the statute, if construed as appellant claims it ought to be, would be class legislation, not applying upon the same terms to all in the same situation, nor having any apparent natural reason for any distinction. The frequency and magnitude of the dangers to which those employed in operating railroads are exposed, the difficulty, sometimes impossibility, of escaping from them with any amount of care, when they come; the fact that a great number of men are employed, co-operating in the same work, so that no one of them can know all the others, their competency, skill, and care, so that he may be said to voluntarily assume the risk arising from the want of skill or care by any one of the number,—are a sufficient reason for applying a rule of liability on the part of the employer to the employee so employed, different from that ordinarily applied between master and servant. But no just reason can be suggested why such difference should be founded not on the character of the employment, nor of the dangers to which those employed are exposed, but on the

character only of the employer. We can see why the employer's liability should be greater when the business is that of operating a railroad, but cannot see why one individual or corporation should be held to a rule of liability different from that applied to another, when the employment and its hazards are precisely the same."

In *Johnson v. St. Paul & D. R. Co.* (1890) 43 Minn. 222, 8 L.R.A. 419, 45 N. W. 156, the court reasoned as follows: "If a distinction is to be made as to the liability of employers to their employees, it must be based upon a difference in the nature of the employment, and not of the employers. One rule of liability cannot be established for railway companies, merely as such, and another rule for other employers, under like circumstances and conditions, unless upon the theory suggested in *Missouri P. R. Co. v. Mackey* (1887) 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161, that the state may 'prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters,'—a proposition which, as thus broadly stated, that court, in view of its later utterances, could hardly have intended to announce. . . . Hence, most courts, as, notably, in Iowa and Kansas, have held that similar statutes, although general in their terms, embrace only 'the peculiar hazards of railroading.' But, when we come to examine the adjudicated cases, we confess we are unable to discover any definite, consistent, or logical rule which the courts have applied in determining whether, upon the facts of a particular case, it fell within or without the statute. In some cases it has been held that the statute applied, because the duty of the employees required them to ride upon the cars to the place of work, although the injury was not sustained while thus riding, and was not caused by, or in any manner connected with, the operation of the road. Such a posi-

But the most recent decisions of the Federal Supreme Court are inconsistent with this theory.¹⁴

By that court it has been held that the clause excepting from the operation of the statute damages sustained by employees engaged in construction of new and unopened railroads does not, as interpreted by the highest court of the state, discriminate against any class of railroads, or deny to such class the equal protection of the laws.¹⁵

f. Mississippi.—In a recent case,¹⁶ the court, referring to the clause of the state Constitution, § 193, which provides that every railroad

tion seems to us wholly illogical. Other cases have been held within the statute because the work being performed was necessary to the use and operation of the road, although the injury sustained was not caused by, or connected with, such use and operation. This, we think, is equally illogical. In fact, the proposition is so broad and definite as to bring within the act all employees, regardless of the nature of their employment; for the work of all, even clerks in offices is, in a sense, necessary to the use and operation of the road. Therefore, after mature consideration, our conclusion is that, if any limitations is to be placed by the courts upon the application of this statute (and on constitutional grounds there must be), the only one which will furnish any definite or logical rule is to hold that it only applies to those employees who are exposed to the peculiar hazards incident to the use and operation of railroads, and whose injuries are the result of such dangers."

¹⁴ See cases cited in notes 11, 12, *supra*.

¹⁵ *Minnesota Iron Co. v. Kline* (1905) 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159, affirming (1904) 93 Minn. 63, 100 N. W. 681. In that case, where the plaintiff was injured while engaged in repairing an engine on a narrow-gauge track used for the dump cars of a mining company, the court argued thus: "If the statute, as interpreted, is not within the prohibitions of the 14th Amendment, we do not interfere with the construction adopted by the state court. The state court held that the act was confined to the dangers peculiar to railroads, and did not discriminate against railroad companies merely as such. It read the proviso as only exempting incomplete roads, marking the time when the statute should take effect, and not as confining it to roads intended for public travel. Before us it was argued that when the M. & S. Vol. VIII.—556.

statute was passed there were no private railroads in the state, and that if the proviso is taken to mean what the court said, the discrimination is senseless and unjustified; whereas if it be taken to confine the statute to public roads after public travel has begun, the distinction may be maintained. We are of a different opinion. Some time must be fixed when the law shall begin to operate, and the time when the road is finished is a natural and proper time. There may be unavoidable and exceptional dangers before the track is finished and while cars are being run over it for construction purposes, and the legislature might think it proper that the servant should take the risk of these, even if the negligence of a fellow servant co-operated, just as he takes the risk of the known peculiar dangers when he sets about repairing the effects of an accident. The fact that there may be also dangers like those on the finished road does not prevent the legislature from considering the situation as a whole, and keeping the old rule on practical grounds until the exceptional risks come to an end. . . . Of course, there is no objection to legislation being confined to a peculiar and well-defined class of perils, and it is not necessary that they should be perils which are shared by the public, if they concern the body of citizens engaged in a particular work. *Holden v. Hardy* (1898) 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383. It was not argued that the statute was bad as interfering unduly with freedom of contract. . . . The whole case is put on the proviso, and the argument with regard to that is merely one of the many attempts to impart an overmathematical nicety to the prohibitions of the 14th Amendment."

¹⁶ *Givens v. Southern R. Co.* (1909) 94 Miss. 830, 22 L.R.A.(N.S.) 971, 49 So. 180.

employee shall have the same rights and remedies for an injury suffered from the act or omission of the corporation or its employees as are allowed to persons not employees, where it results from the negligence of a superior agent or officer, or one having the right to control or direct the services of the party injured, and also when the injury results from the negligence of a fellow servant in another department of labor from that of the party injured, stated that, according to the theory established by previous decisions, the only ground upon which this provision could be upheld is that which is afforded by "the fact of the inherent danger attending the operation of railroads by the highly dangerous agency of steam."¹⁷ As the footnote

¹⁷ One of the cases cited in support of this statement was *Ballard v. Mississippi Cotton Oil Co.* (1903) 81 Miss. 507, 62 L.R.A. 407, 95 Am. St. Rep. 476, 34 So. 533, which affirmed the invalidity of the enactment which purported to extend the operation of the constitutional provision to "corporations" of all kinds. See § 2843, note 4, *ante*.

The second precedent referred to was *Bradford Constr. Co. v. Heftin* (1906) 88 Miss. 314, 12 L.R.A.(N.S.) 1040, 42 So. 174, 8 Ann. Cas. 1077, where the invalidity of the amending act was again affirmed, and the constitutional provision itself was declared to deny railway companies the "equal protection of the laws."

In the third case mentioned (*Mobile, J. & K. C. R. Co. v. Hicks* [1908] 91 Miss. 273, 124 Am. St. Rep. 679, 46 So. 360), the inherently dangerous character of railroad work was again relied on as a ground for holding the constitutional provision to be valid. The statute was held to inure to the benefit of the foreman of a crew, who, while standing aside to let a train pass, was killed as a result of its derailment. On appeal to the Federal Supreme Court this judgment was affirmed. See *Mobile, J. & K. C. R. Co. v. Turnipseed* (1910) 219 U. S. 35, 55 L. ed. 78, 32 L.R.A. (N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912 A, 463. Commenting upon the argument of counsel "that the provision has been construed in the present case as applicable to an employee not subject to any danger or peril peculiar to the operation of railway trains, and that therefore the reason for such special classification fails, and the pro-

vision, so construed and applied, is invalid, as a denial of the equal protection of the law," the court said: "This contention, shortly stated, comes to this: that although a classification of railway employees may be justified from general considerations based upon the hazardous character of the occupation, such classification becomes arbitrary, and a denial of the equal protection of the law, the moment it is found to embrace employees not exposed to hazards peculiar to railway operation. But this court has never so construed the limitation imposed by the 14th Amendment upon the power of the state to legislate with reference to particular employments as to render ineffectual a general classification resting upon obvious principles of public policy, because it may happen that the classification includes persons not subject to a uniform degree of danger. The insistence, therefore, that legislation in respect of railway employees generally is repugnant to the clause of the Constitution guarantying the equal protection of the law, merely because it is not limited to those engaged in the actual operation of trains, is without merit. The intestate of the defendant in error was not engaged in the actual operation of trains. But he was nevertheless engaged in a service which subjected him to dangers from the operation of trains, and brought him plainly within the general legislative purpose." The court referred to *Louisville & N. R. Co. v. Melton*, 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. Rep. 676, in which its views with regard to the whole matter of classification had been expounded. See § 2840, note 8, *ante*.

indicates, one of the decisions thus relied upon was affirmed by the Federal Supreme Court.

g. Missouri.—It has been held that the enactment which abrogates the doctrine of common employment as regards servants of corporations operating railroads does not deny the equal protection of the law, since it does not deprive railway companies of property without due process of law, and is not unlawful class legislation.¹⁸

h. Montana.—The contention that the enactment which declares that railway corporations shall be liable for injuries resulting to servants from the negligence of other servants of certain specified classes violates the prohibition against denying the equal protection of the laws has been rejected on the ground that the expression "railway corporation" is a general one, connoting all persons engaged in operating railways.¹⁹

i. Nebraska.—The enactment which provides that every railway company shall be liable to "any of its employees who, at the time of injury, are engaged in construction or repair work, or in the use or operation of any engine, car, or train, for all damages that may result from the negligence of any of its officers, agents, or employees," has been upheld, against the objection that it deprives railway companies of the equal protection of the laws, both by the supreme court of the state,²⁰ and by the Federal Supreme Court.²¹

j. North Carolina.—The enactment which abrogates the doctrine of common employment so far as regards railway companies has been declared not to be in conflict with art. 1, § 7, of the state Constitution, which forbids the conferring of an "exclusive privilege upon any set of men," since it applies to a well-defined class, and operates equally as to all within that class.²²

k. Ohio.—The enactment which provides that any employee of a railway company who has power to control another is not the fellow

¹⁸ *Powell v. Sherwood* (1901) 162 Mo. 605, 63 S. W. 485. In a later case it was expressly held that the act does not violate the equality clause of the Federal Constitution, although it does not confine such liability to acts performed in the operation of the road, but extends it to risks similar to those incurred by the employees of persons or corporations engaged in other lines of work. *Callahan v. St. Louis Merchants' Bridge Terminal R. Co.* (1902) 170 Mo. 473, 60 L.R.A. 249, 94 Am. St. Rep. 746, 71 S. W. 208, affirmed in (1904) 194 U. S. 628, 48 L. ed. 1157, 24 Sup.

Ct. Rep. 857. For the facts involved in this case, see § 1784, note 14, *ante*.

¹⁹ *Lewis v. Northern P. R. Co.* (1907) 36 Mont. 207, 92 Pac. 469.

²⁰ *Swoboda v. Union P. R. Co.* (1910) 87 Neb. 200, 138 Am. St. Rep. 483, 127 N. W. 215 (see § 1786, *ante*).

²¹ *Missouri P. R. Co. v. Castle* (1912) 224 U. S. 541, 56 L. ed. 875, 32 Sup. Ct. Rep. 606, affirming (1909) 97 C. C. A. 124, 172 Fed. 841.

²² *Hancock v. Norfolk & W. R. Co.* (1899) 124 N. C. 222, 32 S. E. 679, following the Federal decisions as to the Kansas and Iowa statutes.

servant of the employee under his control has been held not to be invalid, either as being special legislation,²³ or as being in conflict with the "equality clauses" of the Federal and state Constitutions,²⁴ or as contravening the provision of the state Constitution which prescribes that all laws of a general nature shall have a uniform operation throughout the state.²⁵

²³ *Froelich v. Toledo & O. C. R. Co.* (1903) 24 Ohio C. C. 359; *Baltimore & O. R. Co. v. Hottman* (1903) 25 Ohio C. C. 140 (for statute, see § 1757, *ante*).

²⁴ *Kane v. Erie R. Co.* (1904) 68 L.R.A. 788, 67 C. C. A. 653, 133 Fed. 681. The court said: "The doctrine is well settled that the general assembly, in the absence of an applicable prohibition, has power to classify subjects of legislation, conferring rights or imposing burdens on the created classes, according to its views of what is just and expedient and will promote the general welfare, subject only to the limitation that there must be some reasonable ground for the classification made.

. . . The sole question in the case, therefore, is whether the exercise of authority in the service affords a reasonable ground for the classification of railroad employees. . . . The court below based its holding that the act is unconstitutional upon the ground that the classification was wholly arbitrary; that there is no real distinction in the railroad service between an employee who exercises authority and one who does not,—for instance, between an engineer and a fireman; yet, under the law, if both, while running a train, were injured through the negligence of the engineer of another train, the fireman, having no one under him, would have a right to recover, while the engineer, being in control of the fireman, would not. The court thought this placed the power of classification in the hands of the company, and suggested that it could substantially relieve itself from all liability by placing on each train a boy, who, by its rules, would be in the charge or control of every other employee on the train. As to the suggestion, obviously the company could do nothing of the kind. By no trick of that sort could it evade the law and escape liability. The court would look through the sham to the real grades of the service. *Baltimore & O. R. Co. v. Baugh* (1893) 149 U. S. 368, 380, 37 L. ed. 772, 778, 13 Sup. Ct. Rep. 914. But

passing this, the court in its supposed case lost sight of the positions, relative to one another, occupied in the service by an engineer and a fireman. Under the old law the engineer was deemed the superior, and not the fellow servant, of the fireman, if both were on the same engine. Now, this was a reasonable distinction, because the supreme court of Ohio itself made it. Is it any less reasonable to say that an engineer is the superior of a fireman, although they are on different engines? This is what the new law says. If the distinction made by the old law is reasonable, why call that made by the new arbitrary? In each case there was an attempt to define who should be regarded as fellow servants by a process of exclusion. The old law excluded the direct superior of the injured employee; the new excludes in addition the indirect superior. The ground is the same,—that they are not in a common service. . . . Why should not the railroad company be held responsible for an injury to a brakeman or fireman, resulting from the negligence of a conductor or engineer, whether in his own branch or department, having control over him, or in another branch or department, exercising authority there? May not such a superior be reasonably treated as the representative of the company, in a sense a vice principal, for whose negligence the company is rightly responsible, unless the person injured be a fellow servant of the negligent employee? Finally, looking at the policy of the act, is not the effect of the new rule to make railroad companies especially careful in selecting their superior employees,—those who exercise authority, who give commands, and upon whose skill and judgment the safe operation of these highways of commerce largely depends?" For a subsequent appeal of the same case, see *Kane v. Erie R. Co.* (1904) 68 L.R.A. 788, 67 C. C. A. 653, 133 Fed. 681, second appeal, 83 C. C. A. 564, 155 Fed. 118.

²⁵ *Peirce v. Van Dusen* (1897) 69 L.R.A. 705, 24 C. C. A. 280, 47 U. S.

l. Oklahoma.—The provision of the Oklahoma Constitution (art. 9, § 36) by which the common-law doctrine is abrogated as regards every employee of every railroad company and every street railway company, and of every person, firm, or corporation, engaged in mining, has been held not to be invalid, as denying the equal protection of the laws.²⁶

m. Texas.—The enactment which applies to all railway companies, and provides that all persons intrusted with authority or control by any railway company are vice principals, and not fellow servants, has been attacked, without success, on the ground that, as it does not comprehend all common carriers, it denies railway companies the equal protection of the laws.²⁷ It has also been upheld against the objection that it interferes with the functions of the supreme court of the state by declaring what classes of servants are to be deemed fellow servants.²⁸

n. Utah.—With reference to an enactment resembling that of Texas, it has been held that the legislature has, unquestionably, authority to make the common master liable to one of his employees or servants for all damages to him caused by the negligence of another of his servants, while the latter is acting about the business or labor which he is authorized to do, regardless of the fact that such servants would, under the general rule, be regarded as fellow servants.²⁹

o. Virginia.—The provision of the state Constitution (§ 162)

App. 339, 78 Fed. 693. The court said: "As it applies to all railroad corporations operating railroads within the state, it is, within the meaning of the state Constitution, general in its nature; and as it applies to all of a given class of railroad employees, it operates uniformly throughout the state."

²⁶ *Missouri, K. & T. R. Co. v. Richardson* (1910) — Tex. Civ. App. —, 125 S. W. 623.

²⁷ *Campbell v. Cook* (1894) 86 Tex. 630, 40 Am. St. Rep. 878, 26 S. W. 486, affirming on this point (1894) — Tex. Civ. App.—, 24 S. W. 977 (for statute, see § 1794, *ante*). It should be observed, however, with regard to the circumstance thus relied upon as a reason for invalidating the statute, it was apparently not conclusive, for it has been laid down that an enactment applicable to carriers, as distinct from other classes of employers, is unconstitutional. See § 2482, *ante*.

The above decision was followed in *Austin Rapid Transit R. Co. v. Groethe* (1895) — Tex. Civ. App. —, 31 S. W. 197 (the supreme court affirmed this judgment [see (1895) 88 Tex. 262, 31 S. W. 196], but did not refer to the constitutional question); *Galveston, H. & S. A. R. Co. v. Gibson* (1899) — Tex. Civ. App. —, 54 S. W. 779; *Missouri, K. & T. R. Co. v. Smith* (1907) 45 Tex. Civ. App. 128, 99 S. W. 743; *Missouri, K. & T. R. Co. v. Bailey* (1909) 53 Tex. Civ. App. 295, 115 S. W. 601; *St. Louis & S. F. R. Co. v. Arms* (1911) — Tex. Civ. App. —, 136 S. W. 1164; *St. Louis, S. F. & T. R. Co. v. Jenkins* (1911) — Tex. Civ. App. —, 137 S. W. 711.

²⁸ *Galveston, H. & S. A. R. Co. v. Worthy* (1894) — Tex. Civ. App. —, 27 S. W. 426.

²⁹ *Dryburg v. Mercur Gold Min. & Mill. Co.* (1898) 18 Utah, 410, 55 Pac. 367.

which abrogates the doctrine of common employment as regards certain specified servants of railroad corporations has been held not to be in conflict with any of the clauses of the Federal Constitution and its amendments.³⁰

Wisconsin.—In the case cited the enactment (now repealed), by which the doctrine of common employment with regard to servants of railway companies, was declared not to be repugnant to the provisions of the state Constitution which prohibit unequal and partial legislation on general subjects,³³ the court disapproved the theory of the Iowa decisions (see subtitle *c*), that the enactment of that state was valid only because it limited the right of recovery to cases in which the injuries were caused by the negligent operation of trains.³⁴

The existing enactment, which provides that every railway company shall be liable to a servant who is injured through the negligence of any other servant has been pronounced constitutional in respect of all classes of servants. The principle relied upon was "that railway carriers, on account of the public character of their business, may properly be classified so far as their relations with their em-

³⁰ *Day v. Atlantic Coast Line R. Co.* (1910) 102 C. C. A. 654, 179 Fed. 26 (doctrine laid down in general terms); *Chesapeake & O. R. Co. v. Hoffman* (1909) 109 Va. 44, 63 S. E. 432 (statute does not deny equal protection of the laws).

³³ *Ditberner v. Chicago, M. & St. P. R. Co.* (1879) 47 Wis. 138, 2 N. W. 69 (Laws of 1875, chap. 173). The court said: "It is conceded that the act would be a valid exercise of legislative power were its provisions restricted to cases of injury caused by the negligent operation of railways. But it is assumed that the statute is not so restricted; that by its terms it seeks to make a railway company liable for an injury to an employee caused by the negligence of another employee, although the negligent act may have no connection with the operation of the railway of the company. The argument is that, because the same liability is not imposed upon other corporations, the statute is void within the rule of *Durkee v. Janesville* (1871) 28 Wis. 464, 9 Am. Rep. 500. . . . The case of *Atty. Gen. v. Chicago & N. W. R. Co.* (1879) 35 Wis. 425, decides the question under consideration adversely to the position maintained by the learned

counsel for the railway company. It was held in those cases that a statute which limited the rates to be charged by railway companies for fares and freights was a valid enactment, although such limitations were not imposed upon other common carriers, whether corporate or individual. The statute was held to be a proper exercise by the legislature of the power granted to it by the Constitution to alter or repeal the charters of those corporations. Const. art. 11, § 1. The same principle is involved in this case. If the legislature can impose limitations and restrictions upon railway companies not imposed upon other common carriers, whether corporate or otherwise, it may in like manner impose liabilities upon such companies from which other common carriers and other corporations are exempt."

³⁴ Compare the doctrinal position of the Federal Supreme Court, as explained in *Louisville & N. R. Co. v. Melton* (1910) 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. Rep. 676 (§ 2840, note 8, ante), and *Mobile, J. & K. C. R. Co. v. Turnipseed* (1910) 219 U. S. 35, 55 L. ed. 78, 32 L.R.A.(N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912 A, 463, 2 N. C. C. A. 243.

ployees are concerned, whether such employees are moving trains or not, and may be made subject to liabilities and obligations greater than those imposed upon other employers of labor.”³⁵ The contention that the clause of the enactment which exempts shop and

³⁵ *Kiley v. Chicago, M. & St. P. R. Co.* (1910) 142 Wis. 154, 125 N. W. 464; *Ladd v. Minneapolis, St. P. & Ste. S. M. Ry. Co.* (1910) 142 Wis. 165, 125 N. W. 468. The court said: “If the law can only be viewed as a classification of laborers or employees based upon the peculiar risks which men who operate trains necessarily meet and which are not met by men who are employed by firms or corporations engaged in other occupations, then it may be admitted for the sake of the argument that the classification attempted in this law is indefensible, because in that case it should have been confined to those employees who meet such peculiar risks, namely, those engaged in or about the operation of trains, while the law (with two exceptions to be noticed later) in fact includes all classes of employees, many of whom meet no peculiar risk, but only the same risks which the employees of ordinary business concerns are daily meeting. It is not denied that a number of courts have condemned similar laws upon this very ground, notably the courts of Iowa and Minnesota, and it may be admitted that such was, for a time at least, the prevailing doctrine.” The following comment was made upon the decision in *El Paso & N. T. R. Co. v. Gutierrez* (1909) 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21, affirming the constitutionality of the Federal Fellow Servant Act of 1906, so far as it applied to the District of Columbia and the Territories: “It is true that the point now raised is not discussed in the opinion, but the decision certainly stands as a direct holding that a law making a common carrier liable for injuries to any employee resulting from the negligence of a co-employee is a valid law. While the 14th Amendment only inhibits states from depriving persons of life, liberty, or property without due process of law, the same inhibition is placed upon the United States by the 5th Amendment, and both state and national legislatures are governed by the principle that there can be no discrimination in the laws

except such as is based upon just and proper classification.”

On the first appeal of the *Kiley Case* (1909) 138 Wis. 215, 119 N. W. 309, 21 Am. Neg. Rep. 394, the court said: “It is strenuously urged that the imposition of these burdens and liabilities on railroad companies only, as a class, violates their right to the equal protection of the law, and that, being a classification based upon the character of the corporation, it furnishes no reasonable distinction or necessity for separating them into a class for purposes of legislation. To ascertain wherein distinction is made by the legislature between railroad companies and individuals and other corporations and associations we must consider the nature and object of the regulation as well as the provisions prescribing rules for the regulation of railroad companies as a class. The context of this statute shows that railroad companies are separated into a class for legislative regulation respecting their liability to their employees for injuries caused by their negligence or the negligence of other employees in the course of their employment. Is the railroad business distinguished in character from all other businesses so far as to justify special regulation of it, as is done by this law? This we think must be answered in the affirmative. The business of operating a railroad differs from others in its nature, in its relation to the public, and in the peculiar dangers and hazards as regards its employees and the public. These characteristics clearly distinguish the railroad from any other business and call for regulation to meet the conditions and exigencies peculiar to it and such as are wholly inapplicable to any other business. The object of this law is to attain reasonable protection to its employees and to secure the safety of the public. The legislature seeks to attain this through the imposition of these unusual burdens and liabilities, thereby securing from railroad companies the exercise of a degree of care in the selection of competent and careful employees for the conduct of

office employees from its purview creates an unlawful sub-classification was rejected.⁸⁶ It was also held that the clause by which it is provided that, in actions brought under the statute, the question of negligence and contributory negligence shall be for the jury is merely declaratory of the common-law rule as to the respective provinces of court and jury, and is consequently not repugnant to the section of the state Constitution by which judicial power is vested in certain designated courts.⁸⁷

the business commensurate with the hazards and dangers to its employees and the insecurity of the public. Securing the safety of the public in addition to the protection of its employees, is an important feature which distinguishes a railroad business from any other, and is an important consideration in separating railroads into a class by themselves for legislative purposes." Under the doctrine thus laid down, a fence builder was held to be entitled to recover for an injury to his eye caused by a flying staple.

⁸⁶ On the first appeal the court said with regard to this point: "The exemption of shop and office employees from the operation of the law seems an appropriate one, because they are not engaged in that part of the business which exposes them to the unusual dangers and hazards of the business; nor does their conduct bear so directly in securing the safety of the public. It is suggested that this exemption is improper because these employees may be subjected to hazards or perils equally dangerous to those to which other employees are subjected. Conceding that this may be true, still that would not invalidate the classification. We do not find the legislative power to classify confined within such narrow limits. . . . We are of opinion that the office and shop employees are sufficiently distinct in their employment and relation to the conduct of the railroad business to justify the legislature, within the field of its discretion and with regard to public policy, in exempting them from the operation of the law." On the second appeal the following remarks were made: "Subclassification of a class is entirely permissible, but, like all other classification, it must be based upon real distinctions

germane to the purpose of the law and suggesting at least the propriety of substantial difference in legislation. On the other hand, the question whether there is room or necessity for classification is one resting primarily with the legislature, and no court is justified in declaring classification baseless, unless it can say without doubt that no one could reasonably conclude that there is any substantial difference justifying different legislative treatment. *State v. Evans* (1907) 130 Wis. 381, 110 N. W. 241; *Servonitz v. State* (1907) 133 Wis. 231, 126 Am. St. Rep. 955, 113 N. W. 277. Nor is classification to be condemned by the courts because the situation of certain individuals in one class may not differ materially from the situation of certain individuals in another class. Such is frequently the case. It is the class, considered broadly as a class, which must possess the distinguishing differences of situation calling for different legislation, not every individual in the class. *State v. Evans, supra*. Bearing these well-established rules in mind, we still find ourselves unable to say that the classification which exempts shop and office employees from the provisions of the law passes the bounds of reason. Speaking generally of the shop and office employees as a class, they are in less danger from the negligence of co-employees, and perform duties less directly and vitally connected with the public safety, than train employees and track repairers, who constitute a very large percentage of the other class, and we cannot say that the differences are not such as would justify a reasonable mind in concluding that they suggest the propriety of substantial difference in legislative treatment."

⁸⁷ Ruling on the first appeal.

2845. Enactments imposing liability upon masters for the defaults of servants selected from a limited class of persons.—The Illinois mining act, which imposes upon mine owners a liability for the defaults of mine managers and mine examiners whom they are required to appoint out of the limited class of persons who hold licenses issued by the state mining board, has been upheld by the Supreme Court of the United States against the objections that it abridges the privileges and immunities of mine owners, deprives them of their property without due process of law, and denies them the equal protection of the law.¹

This ruling is essentially inconsistent with the position of the supreme court of Pennsylvania. The law of that state, which requires every owner of a coal mine to employ a mine foreman holding a state certificate of competency, who shall, on every alternate day, examine every working place in the mine and direct it to be properly secured, and permit no one to work in an unsafe place, except to make it secure, is unconstitutional in so far as it makes the owner liable for injuries sustained by other employees by reason of the failure of the foreman

¹ *Wilmington Star Min. Co. v. Fulton* (1906) 205 U. S. 60, 51 L. ed. 708, 27 Sup. Ct. Rep. 412, affirming (1904) 68 L.R.A. 168, 66 C. C. A. 247, 133 Fed. 193 (act of July 1, 1899). The court said: "It is conceded that the statute in question has been authoritatively interpreted by the supreme court of Illinois as imposing upon mine owners responsibility for the defaults of mine managers and mine examiners, employees who are required by the statute to be selected by the mine owners from those holding licenses issued by the state mining board created by the statute. And it is an alleged incompatibility between such responsibility of the mine owner and the obligation imposed upon the mine owner to employ only persons licensed by the state, and the nature and character of the duties which the statute imposes upon them, upon which is based the asserted repugnancy of the statute to the 14th Amendment. . . . Accepting this interpretation of the Illinois statute, and in view of the ruling in *Consolidated Coal Co. v. Seniger* (1899) 179 Ill. 370, 374, 375, 53 N. E. 733, that it is not obligatory upon a mine owner to select a particular individual, or to retain one when selected, if found incompetent, we think the act is not repugnant to the 14th Amendment in any particular. In legal effect, duties are imposed upon the mine owner cus-

tomarily performed for him by certain employees, duties which substantially relate to the furnishing of a reasonably safe place for the workmen. The subject was one peculiarly within the police power of the state, and the enactment of the regulations counted upon, we think, was an appropriate exercise of such power. The use and enjoyment of mining property being subject to the reasonable exercise of the police power of the state, certainly the rights, privileges, and immunities of a mine owner as a citizen of the United States were not invaded by the regulations in question: and the imposition of liability upon the owner for the violation of such regulations, being an appropriate exercise of the police power, was not wanting in due process. And even although the liability imposed upon the mine owner to respond in damages for the wilful failure of the mine manager and mine examiner to comply with the requirements of the statute was not in harmony with the principles of the common law applicable to the relation of master and servant, it being competent for the state to change and modify those principles in accord with its conceptions of public policy, we cannot infer that the selection of mine owners as a class upon which to impose the liability in question was purely arbitrary and without reason. And the views just expressed

to perform his prescribed duties properly.² The *ratio decidendi* was that such an enactment violates the clause of the Pennsylvania Bill of Rights, which protects the right to acquire, possess, and protect property. It was the opinion of the court that "the preservation of this right requires both that every man should be answerable for his own acts and engagements, and that no man should be required to answer for the acts and engagements of strangers over whom he has no control." But as the scope of the provision thus held to have been infringed is, in the given connection, virtually coextensive with that of the "due process" clause in the Federal Constitution, the declarations of the Federal Supreme Court, that this clause is not violated by another statute which closely resembles the Pennsylvania act, seems to have rendered the position of the state court no longer tenable.

2846. Enactments revoking special exemptions accorded to certain corporations.—A provision in the charter of a railroad company by virtue of which it is relieved from liability for the death of an employee does not constitute a contract in such a sense that the state cannot amend it without infringing the prohibition against impairing the obligation of contracts.¹

also adequately dispose of the contention that by the statute the mine owner was denied the equal protection of the laws."

² *Durkin v. Kingston Coal Co.* (1895) 171 Pa. 193, 29 L.R.A. 808, 50 Am. St. Rep. 801, 33 Atl. 237 (act of June 2, 1891). The court argued thus: "We must remember that the injury complained of is due to the negligence of a fellow workman, for which the master is responsible neither in law nor morals. We must also remember that this fellow workman has been designated by the state, his duties defined and his powers conferred by statute, and his employment made compulsory under heavy penalties by the same statute. Finally, we must remember that it is the negligence of this fellow servant, whose competency the state has certified and whose employment the state has compelled, for which the employer is made liable. The state says: 'He is competent. You must employ him. You shall surrender to his control the arrangements for the security of your employees.' It then says, in effect: 'If we impose upon you by certifying to the competency of an incom-

petent man, or if the man to whom we commit the conduct of your mines neglects his duty, you shall pay for our mistake and for his negligence.'" This decision was followed in *Dempsey v. Buck Run Coal Co.* (1910) 227 Pa. 571, 76 Atl. 745.

¹ In *Texas & N. O. R. Co. v. Miller* (1910) — Tex. Civ. App. —, 128 S. W. 1165, the court reasoned thus: "It is a general principle that the legislature cannot diminish the power of its successors by irrepealable legislation; for, if it could, one legislature might so fetter its successors as to destroy the functions and powers of representative government. Railroad companies are public-service corporations, chartered, maintained, and run in the interest of the public, and cannot break or be let loose from the power or control of the public without becoming the masters, instead of the servants, of the people. . . . The safety of passengers and expeditious carriage of freight depend, in a large measure, upon the preservation of the lives of the train operatives; and no better way has ever been devised to secure these ends than to hold rail-

2847. Enactments assimilating the remedial rights of certain classes of persons to those of servants.—The Pennsylvania statute of April 4, 1868, P. L. 58, providing that any person, not a passenger, employed in and about a railroad, but not an employee, shall in case of injury or loss of life have only the same right of recovery as though he were an employee, has been repealed by the act of June 10, 1907.¹ While it was still in force it was pronounced by the Supreme Court of Pennsylvania not to be in contravention of the state Bill of Rights.²

road companies liable for the death of its train operatives resulting from negligence of such companies. So an act creating such liability, though the damages are given to the members of the deceased's family, may be regarded, in one sense of the term, an exercise of the police power of the state,—a power of which it cannot be divested by the legislator. If the Constitution itself should endeavor to inhibit the exercise of such power, it would simply result, if heeded, in the destruction of the principal functions of government."

In *Texas & N. O. R. Co. v. Gross* (1910) — Tex. Civ. App. —, 128 S. W. 1173, the court thus stated its conclusions: "The legislature doubtless had power to create a liability for damages for death arising from negligence of another. This power, if exercised in a constitutional manner, would be by a law general in its character. A law making certain railway companies liable, and not others, or exempting one and not others in such cases, would clearly be void. Consequently, if the special immunity granted to this defendant be valid, a situation was created in the state in which no law general in its application, and therefore no valid law on the subject, could be enacted. It must be held, either that the immunity given this defendant was a surrender altogether of the power of the state to legislate on this subject, or that the statute of 1884 [damage act] included this defendant in its operation. It cannot, we think, be successfully claimed that the legislature may, by a contract with a person or corporation, include that which would necessarily consist in a surrender of its right to legislate on a subject of this character."

¹ In *Lewis v. Pennsylvania R. Co.* (1908) 220 Pa. 317, 18 L.R.A. (N.S.) 279, 69 Atl. 821, 13 Ann. Cas. 1142, it

was held that the repeal of the act pending a suit by the representative of a Pullman car conductor, to recover damages for his death from the railroad company, did not change the liability of the company in that particular case.

² *Kirby v. Pennsylvania R. Co.* (1874) 76 Pa. 506. The court said: "It may be conceded that the natural rights of men, among them that of personal security, are guarded by the Bill of Rights, and 'that all courts shall be open, and every man, for an injury done him in his lands, goods, person, and reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay.' But in what respect does this law trench upon this guaranty, or indeed on any other in the Constitution? The person to be affected by it must be one lawfully engaged or employed on or about the road, etc. To be thus engaged he must be there by his own consent. He is therefore voluntarily there to perform some act or business connected with the roads and its works. He knowingly assumes a relation regulated by the law, and thus places himself under the operation of the law which governs the relation. He is not bound to assume the relation, and when he does he acts with his eyes open. The law is not retrospective, and takes from him no remedy for an injury already sustained. The relation he assumes is one of danger, and the fact of danger authorizes the regulation by the state as the conservator of the lives, security, and property of her citizens. It is a police regulation which, having respect to the general good, forbids individuals from undertaking a dangerous employment except at their own risk to the same extent as if they were in the immediate employment of the railroad company. Leaving each one to assert

It was also sustained by the Supreme Court of the United States against the objections that it was in conflict with the 14th Amendment of the Federal Constitution.³

G. WORKMEN'S COMPENSATION ACTS.

2848. Massachusetts.— The purport of the first two sections of this act (see pp. 5553, *et. seq.*, *ante*) is that, except in the case of domestic servants and farm laborers, it shall not be a defense to a common-law action for personal injuries sustained by an employee in the course of his employment (1) that the employee was negligent: (2) that the injury was caused by the negligence of a fellow employee: (3) that the employee had assumed the risk of the injury. In its answer to the questions submitted to it by the legislature while this act was under consideration, the supreme court con-

his proper remedy against the person whose act or negligence does him the injury, the law says to him that the legal principle of *respondeat superior* shall have no place in this particular relation; that as a matter of proper policy for the good of all, those who voluntarily venture into employment alongside of the servants of a railroad company shall have just the same remedies for injuries happening in the employment that these have, and none other. In doing this no fundamental right of the person thus voluntarily venturing is cut off or struck down. The liability of the company for the acts or omission of others, though they be servants, is only an offspring of law. The negligence which injures is not theirs in fact, but is so only by imputation of law. The law which thus imputes it to the company for reasons of policy can remove the imputation from the master, and let it remain with the servant whose negligence causes the injury."

³ *Martin v. Pittsburg & L. E. R. Co.* (1906) 203 U. S. 284, 51 L. ed. 184, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87 affirming (1905) 72 Ohio St. 659, 76 N. E. 1129. The court said: "If it be conceded, as contended, that the plaintiff in error could have recovered but for the statute, it does not follow that the legislature of Pennsylvania in preventing a recovery took away a vested right or a right of property. As the

accident from which the cause of action is asserted to have arisen occurred long after the passage of the statute, it is difficult to grasp the contention that the statute deprived the plaintiff in error of the rights just stated. Such a contention in reason must rest upon the proposition that the state of Pennsylvania was without power to legislate on the subject, a proposition which we have adversely disposed of. . . . The proposition that the statute denied to the plaintiff in error the equal protection of the laws because it 'capriciously, arbitrarily, and unnaturally,' by the classification made, deprived railway mail clerks of the rights of passengers, which they might have enjoyed if the statute had not been enacted, is without merit. The classification made by the statute does not alone embrace railway mail clerks, but places in a class by themselves such clerks and others whose employment in and about a railroad subject them to greater peril than passengers in the strictest sense. This general difference renders it impossible in reason to say, within the meaning of the 14th Amendment, that the legislature of Pennsylvania, in classifying passengers in the strict sense in one class, and those who are subject to greater risks, including railway mail clerks, in another, acted so arbitrarily as to violate the equal protection clause of the 14th Amendment."

strued the clauses relating to negligence "as meaning contributory negligence or negligence on the part of a fellow servant which falls short of the serious and wilful misconduct which under pt. II, § 2, will deprive an employee of the right to compensation," and expressed the opinion that the section when so construed was constitutional.¹ This conclusion was based upon the theory that "the rules of law relating to contributory negligence, and assumption of the risk, and the effect of negligence by a fellow servant, were established by the courts, not by the Constitution, and that the legislature may change them or do away with them altogether as defenses (as it has to some extent in the employers' liability act) as in its wisdom, in the exercise of powers intrusted to it by the Constitution, it deems will be best for the 'good and welfare of this commonwealth.' Const. (Mass.) chap. 1, § 1, art. 4."

Adverting to the express provision in the act that it shall not apply to injuries sustained before it takes effect, the court laid it down that "if, therefore, a right of action which has accrued under existing laws for personal injuries constitutes a vested right or interest, there is nothing in the section which interferes with such right or interest. The effect of the section is not to authorize the taking of property without due process of law, as the court of appeals of New York held was the case with the statute referred to in the preamble to the questions submitted to us, and which in consequence thereof was declared by that court to be unconstitutional."²

The court could see nothing unconstitutional in enacting that the provisions of the first section should not apply to domestic servants and farm laborers, nor in enacting that the employee should be deemed to have waived his right of action at common law if he should not have given the prescribed notice to his employer. The effect of this latter enactment "is to leave it at the employee's option whether he will or will not waive his right of action at common law."

The object of the second part of the act was stated to be the establishment of "a scheme for providing, through the instrumentality of a corporation established for that purpose, entitled the Massachusetts Employee's Insurance Association, and the Subscription of Employers thereto, for compensation to employees for personal injuries received by them in the course of their employment, and not

¹ *Opinion of Justices* (1911) 209 201 N. Y. 271, 34 L.R.A.(N.S.) 162, Mass. 607, 96 N. E. 308. 94 N. E. 431, Ann. Cas. 1912B, 156

² *Ives v. South Buffalo R. Co.* (1911) (see § 2850, *post*).

due to serious and wilful misconduct on their part." The conclusion arrived at was that, "taking into account the noncompulsory character of the proposed act," there was in the provisions relating to this scheme nothing which was not "in conformity with" the 14th Amendment of the Federal Constitution, which infringed any provision of the Massachusetts Constitution in regard to the taking of property "without due process of law."³

It was furthermore declared to be within the power of the legislature to provide (by § 20) that no agreement by an employee to waive his rights to compensation under the act should be valid.

The opinion was also expressed that there was nothing unconstitutional in a proposed amendment providing that any liability insurance company authorized to do business in this commonwealth should have the same right as the corporation created by the act to insure the liability to pay the compensation provided for in the act, that a policy holder of such liability company should be regarded as a subscriber so far as applicable within the meaning of the act, and that when any such company insured the payment of compensation it should be subject to all the regulations and obligations imposed upon the corporation created by the act.

2849. Montana.—The act in this state (see pp. 5582 *et seq.*, *ante*) "provides for a state accident insurance and total permanent disability fund for coal miners. By its terms, a method of compensation is provided for injury or death of a coal miner, regardless of the manner in which the injury was inflicted or the death caused. It ignores, and was intended to ignore, any question of fault on the part of either employer or employee. It provides an insurance for persons who have no cause of action at law, and extends its

³ Under this head it was observed "there is nothing in the act which compels an employer to become a subscriber to the association, or which compels an employee to waive his right of action at common law and accept the compensation provided for in the act. In this respect the act differs wholly, so far as the employer is concerned, from the New York statute above referred to. By subscribing to the association, an employer voluntarily agrees to be bound by the provisions of the act. The same is true of an employee who does not choose to stand upon his common-law rights. An employer who does not subscribe to the association will no longer have the right, in an action by his employee against him at common law, to set up the defense of contributory negligence or assumption of the risk, or to show that the injury was caused by the negligence of a fellow servant. In the case of an employee who does not accept the compensation provided for by the act, and whose employer has become a subscriber to the association, an action no longer can be maintained for death under the employer's liability act. But these considerations do not constitute legal compulsion or a deprivation of fundamental rights."

benefits also to those who have a cause of action, if they so elect.”¹ In the cases cited below it was pronounced unconstitutional for the reason that it denies to an operator of a mine the equal protection of the laws in this respect,—that it contains no specific provision appropriate to protect him against being compelled to pay damages awarded in a common-law action after the injured servant has received compensation out of the insurance fund.²

Against several other objections the act was sustained. These are enumerated in the opinion of the court under the following heads:

(1) “The act does not amount to an exercise of the police power, so called, because not preventive in its nature, and because it does not serve any of the necessary ends of police legislation.” The court took its stand upon the proposition “that the right to exercise police authority as such over the operator arises, in part at least, from the fact that he is engaged in an extrahazardous business, which may, by reason of the liability of his employees to injury therein, resulting in death or partial or permanent disability, cause them to become public charges, thus lowering the standard of citizenship and increasing the general burden of taxation; and from the further fact that our present system of common law and statutory actions greatly increases the expense of maintaining our courts, causes a vast economic waste, and tends to create breaches and dissensions between employer and employee which would otherwise not exist. . . . The latter consideration is one pertaining to the peace, order, and morals of the community, which are universally recognized as subject to control and regulation by the state.”³ The opinion was expressed that the

¹ *Cunningham v. Northwestern Improv. Co.* (1911) 44 Mont. 180, 119 Pac. 554.

² The court, after referring to its ruling in another part of the opinion “that the fact that actions at law are not abolished by the act is not, of itself, a sufficient reason for declaring the statute unconstitutional,” said: “After full compliance with the terms of the act, the employer is not exonerated from liability. He may still be sued and compelled to pay damages in a proper case. No provision is made for reimbursement in whole or in part. The injured employees of one operator may all resort to the indemnity fund, while those of another may elect to appeal to the courts. The result is that the employer against whom an action is successfully prosecuted is compelled

to pay twice. He has fully paid his assessments under the act, and is also obliged to pay damages. This fact is so palpable as to be needless of discussion. The act in this regard is not only inequitable and unjust, but clearly illegal and void, as not affording to such employer the equal protection of the laws. . . . The manner in which the equal protection of the laws shall be afforded to the operator is, of course, for the legislative body to determine; but some method must assuredly be provided to protect him from double payments. The act in its present form is, in this regard, so repugnant to all ideas of equity and equality that it must, we think, appeal to every right-thinking person, on the most cursory examination, as unjust.”

³ The court reasoned thus: “For the

contributions which employers and employees were required to make to the insurance are essentially in the nature of "an employment tax upon the occupations of operating and working coal mines. It is not at all necessary to justify the imposition of such a tax that the business itself should particularly require police supervision, although, as we have seen, extrahazardous enterprises may demand restraint and regulation. Such a tax may be imposed, either for regulation or revenue, or for both. Property and occupation are alike legitimate objects of taxation."⁴ It was furthermore laid down that the prescribed tax was levied for a "public purpose," although the act, in its direct operation, enured to the benefit of the injured employee and their dependents, and not to that of the public at large.⁵

purposes of this case, let us turn from its humanitarian features, and suppose for the moment that the sole object of the act is to prevent persons injured in coal mines, and their dependents, from becoming public charges. Viewed in this light, the private benefits to be derived from the law may be disregarded, and its primary object held to be one of public concern solely. Moreover, it cannot be doubted, we think, that the general welfare of the state and its standing among its sister states, as well as among persons generally, necessarily including those who have money to invest, and those who seek new homes and new locations, depends in a great measure upon its industries and the class and welfare of its wage workers. Any measure which tends to minimize indigency, of necessity raises the general standard of the people; any statute which has a tendency to reduce the present enormous expense of operating our courts would seem to be, presumptively, a proper exercise of the police power." In our judgment, the general scheme of this act is well within the police power of the state. If the people, represented by their legislature, are of opinion that the public interests demand that industrial insurance ought to be substituted, in whole or in part, for actions for wrongs, this court certainly cannot say that they are in error." The court referred to the statement in *Noble State Bank v. Haskell* (1911) 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep.

186, Ann. Cas. 1912 A, 487, that "in a general way, the police power extends to all the great public needs," and that "it may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and predominant opinion, to be greatly and immediately necessary to the public welfare."

⁴ With reference to this phase of the subject, the court observed: "The exercise of the police power is properly and necessarily supplemented by the taxing power of the commonwealth, in order to carry the general plan into practical effect. Or, perhaps, it is more accurate to say that the power to tax for the purposes of the act is necessarily included in the police power. It will readily be seen that, unless the power to impose taxes upon the extrahazardous industry can be invoked to create an insurance fund, the act is nugatory."

⁵ The court said: "We think the considerations to which we have heretofore adverted demonstrate that the provisions of the act disclose the fact that its enactment may have been so far a matter of public concern, involving the general good and welfare, that the legislature, in carrying forward the policy of the state, directed by a clearly defined, dominant public opinion, was warranted in declaring, by implication, that the purpose for which the tax is imposed is a public one. This being so, the courts have no power to declare otherwise."

(2) "If the subject were one which could be handled under the police power, so-called, the act is class legislation."⁶

(3) "The act operates to deprive those subject to its terms of their right to trial by jury, guaranteed to them by the Federal and state Constitutions."⁷

(4) "The act operates to take property without due process of law, violates the provisions of the Federal Constitution, as well as article III. § 27, of the Constitution of the state of Montana."⁸

⁶ Discussing the various reasons urged in support of this contention, the court said: The first is that "the act singles out one particularly hazardous employment, and subjects it to burdens not placed upon other hazardous employments within the state. The legislature has declared, in effect, that coal mining is a dangerous and extrahazardous business, and we think it is generally known to be so. . . . The fact that coal mining is alone selected from numerous other dangerous employments is not at all significant. Legislation of this character is in its infancy, and if it be found adequate to correct the evils growing out of the present system, it may gradually be extended to apply to all extrahazardous employments. So long as all persons operating coal mines are treated alike, no one of them has cause of complaint. The same may be said of coal miners. See *Soon Hing v. Crowley* (1885) 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730, and *Missouri P. R. Co. v. Mackey* (1888) 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161."

⁷ This contention was thus dealt with: "The right of trial by jury, which is secured and protected by the Constitution, refers to the trial of cases, actions, or suits at law (see *Kopikus v. State Capitol Comrs.* [1860] 16 Cal. 249), and has no reference to claims against an indemnity fund, such as are provided for by this act, or demands by the state auditor for occupation taxes. There is not anything in the Constitution guarantying a right of trial by jury in case of demand for a license or occupation tax. The adjustment of claims under the act is an administrative function, and not a judicial proceeding; and it is only in certain cases falling under the latter designation that trial by jury is guaranteed by the Constitution. 'Due proc-

ess of law' does not necessarily require a jury trial. *Montana Co. v. St. Louis Min. & Mill. Co.* (1894) 152 U. S. 160, 38 L. ed. 398, 14 Sup. Ct. Rep. 506."

⁸ Discussing this objection the court said: "The phrase 'due process of law' does not necessarily mean by a judicial proceeding. In the case of *Den ex dem. Murray v. Hoboken Land & Improv. Co.* (1855) 18 How. 272, 15 L. ed. 372, the Supreme Court of the United States decided that a sale of land by a marshal of the United States, on a distress warrant, was due process of law. That case contains a very interesting and instructive discussion of the subject. But we need go no further than to inquire whether the collection of an occupation tax in the summary manner provided by the act affords due process of law. This question is set at rest, as to taxes generally, by the case of *Kelly v. Pittsburgh* (1881) 104 U. S. 78, 26 L. ed. 658, wherein the court said: 'Taxes have not, as a general rule, in this country since its independence, nor in England before that time, been collected by regular judicial proceedings. The necessities of government, the nature of the duty to be performed, and the customary usages of the people, have established a different procedure, which in regard to that matter is, and always has been, due process of law.' . . . If we are correct in our former conclusions that the act affords due process of law, and the right of trial by jury has not been violated, then it seems clear that any controversy which may arise concerning the mere administrative duty of collecting and distributing the fund may be decided in such summary manner as the state shall prescribe. . . . Regarded as an act to provide a fund for the benefit of certain employees and their dependents, who would otherwise be remediless, we

(5) "In reserving to the employee his right to an action at law, the act denies to the mine operator the equal protection of the law." As already stated, this objection was, under one of its aspects, held to be fatal to the validity of the act. But in the point of view indicated by the passage quoted below, it was pronounced untenable.⁹

(6) "The provision for payment to an injured employee of his compensation in a lump sum defeats the purpose of the act itself, viewed as a police regulation.

(7) "The act does not differentiate between a careful and careless employer.

(8) "The act lodges judicial power in the state auditor."

2850. New York.—The workmen's compensation act of 1910, which purported to impose upon employers liability irrespective of negligence, engaged in certain occupations, designated as "especially hazardous," was pronounced unconstitutional.¹ One of the objections which was deemed fatal to its validity in respect of the employers was its repugnancy to the provisions of the Federal and state Constitution, which guarantee all persons against deprivation of life, liberty, or property, without due process of law. The doctrinal position of the court under this head may be conveniently stated in the form of a syllogism, in which the major premise was the doctrine that "process of law in its broad sense means law in its regular course of administration through courts of justice, and that

have no doubt that it is within the power of the legislative assembly to intrust the administration of the fund to such official as it may see fit."

⁹ "The fact that one who has a cause of action at common law may elect to take under the act, and the suggestion that as to him the auditor may be called upon to exercise judicial power, has no persuasive force when we consider that such election is altogether voluntary, and he may resort to the courts if he so desires. If the tax provided for in the act can legally be exacted from the employer, and, as is the case, the acceptance of its benefits by the claimant *ipso facto* operates to release the employer from liability, it is difficult to see how the latter has any further concern in the matter of distribution of the fund than to be assured, as the act provides he may be, that it is not paid out on improper or fraudulent claims. If the summary method of administration provided

may not be resorted to, then one of the paramount reasons for this class of legislation must be entirely eliminated from consideration. It seems to us that the opinion of the Supreme Court of the United States, in *Den ex dem. Murray v. Hoboken Land & Improv. Co.* (1855) 18 How. 272, 15 L. ed. 372) effectually disposes of this question, as well as of some others which we have considered. As this opinion is already too long, however, we shall content ourselves with a single quotation therefrom: "Though, generally, both public and private wrongs are redressed through judicial action, there are more summary extrajudicial remedies for both."

¹ *Ives v. South Buffalo R. Co.* (1911) 201 N. Y. 271, 34 L.R.A. (N.S.) 162, 94 N. E. 431, Ann. Cas. 1912 B, 156, reversing (1910) 140 App. Div. 921, 125 N. Y. Supp. 1125, which affirmed (1910) 68 Misc. 643, 124 N. Y. Supp. 920.

is but another way of saying that every man's right to life, liberty, and property is to be disposed of in accordance with those ancient and fundamental principles which were in existence when our Constitutions were adopted." The minor premise was that "when our Constitutions were adopted it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another," and that this is still the law. The conclusion was that this law is contravened by a statute which, like the one under consideration, imposes upon employers, except in cases where the injured servant was guilty of serious and wilful misconduct, an absolute liability, enforceable irrespective of whether they were or were not at fault.² But, with all deference, it is submitted

² The court said: "In arriving at this conclusion we do not overlook the cogent economic and sociological arguments which are urged in support of the statute. There can be no doubt as to the theory of this law. It is based upon the proposition that the inherent risks of an employment should in justice be placed upon the shoulders of the employer, who can protect himself against loss by insurance and by such an addition to the price of his wares as to cast the burden ultimately upon the consumer; that indemnity to an injured employee should be as much a charge upon the business as the cost of replacing or repairing disabled or defective machinery, appliances, or tools; that, under our present system, the loss falls immediately upon the employee, who is almost invariably unable to bear it, and ultimately upon the community, which is taxed for the support of the indigent; and that our present system is uncertain, unscientific, and wasteful, and fosters a spirit of antagonism between employer and employee which it is to the interest of the state to remove. We have already admitted the strength of this appeal to a recognized and widely prevalent sentiment, but we think it is an appeal which must be made to the people, and not to the courts. The right of property rests not upon philosophical or scientific speculations, nor the commendable impulses of benevolence or charity, nor yet upon the dictates of natural justice. The right has its foundation in the fundamental law. That can be changed by the people, but not by legislatures. In a government like ours,

theories of public good or necessity are often so plausible or sound as to command popular approval; but courts are not permitted to forget that the law is the only chart by which the ship of state is to be guided. Law, as used in this sense, means the basic law, and not the very act of legislation which deprives the citizen of his rights, privileges, or property. Any other view would lead to the absurdity that the Constitutions protect only those rights which the legislatures do not take away. If such economic and sociologic arguments as are here advanced in support of this statute can be allowed to subvert the fundamental idea of property, then there is no private right entirely safe, because there is no limitation upon the absolute discretion of legislatures, and the guaranties of the Constitution are a mere waste of words. . . . The argument that the risk to an employee should be borne by the employer because it is inherent in the employment may be economically sound, but it is at war with the legal principle that no employer can be compelled to assume a risk which is inseparable from the work of the employee, and which may exist in spite of a degree of care by the employer far greater than may be exacted by the most drastic law. If it is competent to impose upon an employer, who has omitted no legal duty and has committed no wrong, a liability based solely upon a legislative fiat that his business is inherently dangerous, it is equally competent to visit upon him a special tax for the support of hospitals and other charitable institutions, upon the theory that they are

that the minor premise of this syllogism is unsound. The actual doctrine of the common law is not that responsibilities for injuries can be imputed only on the ground of fault or negligence, but that this is the only footing upon which it can be imputed in cases where no positive duty is owed by the tort-feasor to the aggrieved person. For example, the right to recover damages for a nuisance, irrespective of whether its existence does or does not import culpability, has never been disputed. This single instance is amply sufficient of itself to confute the reasoning of the court in this connection.³ The consideration thus emphasized is, it should be remarked, wholly independent, of the soundness or unsoundness of the theory put forward by counsel in this case, *viz.*, that the statute might properly be upheld on the same ground as the various enactments by which employers' have been subjected to certain specific duties that are unknown to the common law. Even if it should be conceded that the court was justified in rejecting that theory, and taking the position that there is an essential difference between an enactment which merely operates so as to create a new form of negligence and an enactment, which purports to impose liability upon employers who are free from fault, it is still possible to maintain that there is nothing in the principles of the common law to preclude a legislature from declaring that a person who for his own profit or convenience hires servants, and thus brings about a situation which did not before exist, should be absolutely answerable for injuries received by those servants while they are engaged in working for his benefit. It is true that nearly all, if not all, of the positive duties predicated under the common law relate to the control of real property. But this circumstance manifestly does not affect the force of a general argument which is based upon the broad conception, that the recognized existence of such duties renders it unwarrantable to annul

devoted largely to the alleviation of ills primarily due to his business. In its final and simple analysis, that is taking the property of A and giving it to B, and that cannot be done under our Constitutions."

³ In *State ex rel. Yapple v. Creamer* (1912) 85 Ohio St. 349, 39 L.R.A. (N.S.) 694, 97 N. E. 602, the position of the New York court was criticized as being inconsistent with the rule under which the owner of property who "contracts with an independent contractor to do work which, though entirely lawful, yet has inherent probabilities of harm if

negligently performed," is deemed to be responsible for injuries resulting from such negligent performances. But this illustration is scarcely apposite. The question involved in cases which turn upon the right to sue a principal employer for injuries resulting from something done or omitted by an independent contractor or his servants is whether a vicarious liability shall be imputed in respect of an act conceded or proved to be negligent, and not whether a claim for damages can be enforced where no one at all was in fault.

a statute for the reason relied upon by the court in the case under discussion.

Another objection which was considered to be fatal to the validity of the statute was that it could not be regarded as a justifiable exercise of the police power, when it was tested with reference to the principle that, in order to sustain legislation on this ground, "the courts must be able to see that its operation tends in some degree to prevent some offense or evil, or to preserve public health, morals, safety, and welfare. If it discloses no such purpose, but is clearly calculated to invade the liberty and property of private citizens, it is plainly the duty of the courts to declare it invalid; for legislative assumption of the right to direct the channel into which the private energies of the citizen may flow, or legislative attempt to abridge or hamper the right of the citizen to pursue, unmolested and without unreasonable regulation, any lawful calling or avocation which he may choose, has always been condemned under our form of government."⁴ The conclusion arrived at with reference to the principles

⁴ After referring to other provisions of the labor law which satisfy the test thus formulated, the court continued thus: "But the new addition to the labor law is of quite a different character. . . . Its sole purpose is to make him liable for injuries which may be sustained wholly without his fault, and solely through the fault of the employee, except where the latter fault is such as to constitute serious and wilful misconduct. Under this law, the most thoughtful and careful employer, who has neglected no duty, and whose workshop is equipped with every possible appliance that may make for the safety, health, and morals of his employees, is liable in damages to any employee who happens to sustain injury through an accident which no human being can foresee or prevent, or which, if preventable at all, can only be prevented by the reasonable care of the employee himself. . . . We cannot understand by what power the legislature can take away from the employer a constitutional guaranty of which the employee may not also be deprived. If it is beyond the power of the legislature to take from the representatives of deceased employees their rights of action under the Constitution, by what measure of power or justice may the legislature assume to take from the employer the right to have his liability determined in an action at law?

Conceding, as we do, that it is within the range of proper legislative action to give a workman two remedies for a wrong when he had but one before, we ask, by what stretch of the police power is the legislature authorized to give a remedy for no wrong? If, before the passage of this law, the employer had a right to a jury trial upon the question of liability, where and how did he lose it? Can it be taken from him by the mere assertion that this statute only reversed the common-law doctrine that the employee assumes the risk of his employment? It would be quite as logical and effective to argue that this legislation only reverses the laws of nature, for in everything within the sphere of human activity the risks which are inherent and unavoidable must fall upon those who are exposed to them. We must admit that what the legislature may prohibit it may absolutely control. Where the right to exist, as in case of corporations, depends upon the will of the legislature, that right may be granted subject to prescribed conditions. In such a case an employer may be made an insurer of the safety of his employees as a condition of the permission to engage in business. But when an industry or calling is *per se* lawful and open to all, and therefore beyond the prohibitive power of the legislature, the right of governmental control must

thus enounced is based, in so far as it reflects the theory of an invasion of liberty and property, upon the conception which is discussed in the preceding paragraph. That conception is apparently erroneous, but, irrespective of whether it is or is not, the invalidity of the act becomes a necessary inference, if the other proposition maintained by the court was correct, *viz.*, that the act does not satisfy any of the *criteria*, by which it is determined whether a statute falls within the scope of the police power. That proposition, however, would also seem to be untenable. Even if the act was not susceptible of being upheld on the ground of its having a tendency "to preserve public health, morals, or safety," there are same weighty considerations in favor of the view that it conduces to the "public welfare." What they are the reader will see by referring to the sections in which the Montana and Washington statutes are reviewed. It is submitted that they are of sufficient importance to justify a reasonable person in taking the position that the public welfare is really subserved in some particulars by statutes of this type. If this is actually the situation, it may fairly be argued that the New York court was no more warranted in disregarding the opinion of the legislature than it would be in setting aside a verdict based upon evidence from which different inferences may by possibility be drawn.

Other contentions submitted to the court were these:

(1) That the act might be sustained as a proper exercise of the reserved power of the legislature to alter and amend the charters of corporations. This contention did not prevail, for the reason that

be confined to such reasonable enactments as are directly designed to conserve health, safety, comfort, morals, peace, and order. *Lochner v. New York* (1905) 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539. For the failure of an employer to observe such regulations, the legislature may unquestionably enact direct penalties or create presumptions of fault which, if not rebutted by proof, may be regarded as sufficient evidence of liability for damages. That must be the extreme limit of the police power, for just beyond is the Constitution, which, in substance and effect, forbids that a citizen shall be penalized or subjected to liability unless he has violated some law or has been guilty of some fault. . . . The admiralty cases of *The Osceola* (1903) 189 U. S. 158, 47 L. ed. 760, 23 Sup. Ct. Rep. 483; *The City of Alexandria*, 17 Fed. 390, and the case of *Scarff v. Metcalf* (1887) 107 N. Y. 211, 1 Am. St. Rep. 807, 13

N. E. 796, were declared to be inapplicable as authorities for the proposition that the law recognizes liability without fault, because the contracts and services of seamen are exceptional in character; and in view of this fact "the maritime law has wisely and benevolently built up peculiar rights and privileges for the protection of the seamen which are not cognizable in the common law. When he is sick or injured he is entitled to be cared for at the expense of the ship, and for the failure of the master to perform his duty in this regard, the ship or the owner is liable. . . . But beyond this duty on the part of the master or owner, there seems to be no liability whatever for injuries sustained by the seaman in the course of his work. We think it may confidently be asserted that, within the whole range of the maritime law, there will be found no rule which renders master, owner, or ship liable in damages for an injury sustained by the seaman

"nowhere in the act was there any reference to corporations. The liability sought to be imposed was based upon the nature of the employment, and not upon the legal status of the employer."

(2) That the classification of a limited number of employments as dangerous was arbitrary, and was therefore repugnant to the clause of the Federal Constitution which guarantees to citizens the equal protection of the laws. The act was sustained against this objection.⁵

(3) That it violated the clause of the state Constitution which provides that "the trial by jury in all cases in which it has been heretofore used shall remain inviolate forever." No specific ruling was made upon this point, for the reasons that the views of the members of the court with regard to this part of the act were conflicting, and the disposition of the question which it suggested was deemed to be unnecessary to the decision of the case. It was observed, however, that the objection thus put forward was "aimed at the provisions of §§ 219-a and 219-d of the statute, which relate to the 'scale of compensation' and 'settlement of disputes,' and has no reference to the fundamental question whether the attempt to impose upon the employer a liability when he is not at fault constitutes a taking of property without due process of law." It bore "solely upon the question whether these sections deprived the employer of the right to have a jury fix the amount which he shall pay when his liability to pay has been determined against him." Having regard, however, to the circumstance that the "fundamental objection" referred to was, as it would seem, improperly accepted as a ground annulling the act, the views of the court with regard to the constitutionality of the provisions relating to compensation become extremely important. The

without fault on the part of anyone, or without any fault except his own."

⁵ The court said: "There can be no doubt, we think, that all of the occupations enumerated in the statute are more or less inherently dangerous to a degree which justifies such legislative regulation as is properly within the scope of the police power. We need not look for illustration or authority outside of the labor law to which this new statute has been added. The whole of that law which precedes the latest addition is devoted to restrictions and regulations imposed upon employers in specified occupations or conditions for the conservation of the health, safety, and morals of employees. These restrictions and regulations do not affect all employers alike in all occupations, nor are they designed to

have that effect. The mandate of the Federal Constitution is complied with if all who are in a particular class are treated alike (*Missouri P. R. Co. v. Humes* (1885) 115 U. S. 512, 523, 29 L. ed. 463, 466, 6 Sup. Ct. Rep. 110; *Barbier v. Connolly* (1885) 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Soon Hing v. Crowley* (1885) 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Magoun v. Illinois Trust & Sav. Bank* (1898) 170 U. S. 283, 294, 42 L. ed. 1037, 1043, 18 Sup. Ct. Rep. 594; *People ex rel. Hatch v. Reardon* (1906) 184 N. Y. 431, 8 L.R.A.(N.S.) 314, 112 Am. St. Rep. 628, 77 N. E. 970, 6 Ann. Cas. 515; *People ex rel. Farrington v. Mensching* (1907) 187 N. Y. 8, 16, 10 L.R.A.(N.S.) 625, 79 N. E. 884, 10 Ann. Cas. 101), and that, we think, is the effect of this classification."

opinion was expressed that if they "are to be construed as definitely fixing the amount which an employer must pay in every case where his liability is established by the statute, there can be no doubt that they constitute a legislative usurpation of one of the functions of a common-law jury. In all cases where there is a right to trial by jury, there are two elements which necessarily enter into a verdict for the plaintiff: (1) The right to recover; (2) the amount of the recovery. It is as much the right of a defendant to have a jury assess the damages claimed against him as it is to have the question of his liability determined by the same body."

2851. Ohio.—The statute entitled "An Act to Create a State Insurance Fund for the Benefit of Injured and the Dependents of Killed Employees," (see p. 5602, *ante*) has been pronounced constitutional.¹ The various grounds upon which it was unsuccessfully attacked were treated by the court as being reducible to the following heads:

(1) "That it is an unwarranted exercise of the police power, and directs the state to use public funds for private purposes."²

(2) That §§ 20-1 and 21-1 take private property without due process of law. In this point of view one of the contentions put forward

¹*State ex rel. Yapple v. Creamer* (1912) 85 Ohio St. 349, 39 L.R.A. (N.S.) 694, 97 N. E. 602. The following summary of the contents of the act may be quoted from the opinion: "The statute in question provides for the creation of a State Liability Board of Awards, which shall establish a state insurance fund, from premiums paid by employers and employees in the manner provided in the act. It provides a plan of compensation for injuries, not wilfully self-inflicted, resulting from accidents to employees of employers, both of whom have voluntarily contributed to the fund in the proportion of 10 and 90 per cent, respectively. It applies only where the employer has five or more operatives regularly in the same business or in or about the same establishment. An employer who complies with the act is relieved from liability to respond in damages at common law, or by statute, for injury or death of an employee who has complied with its provisions except when the injury arises from the wilful act of himself or officer or agent, or from failure to comply with any law or ordinance providing for protection of life and safety of employees, in which event

the employee or his representatives have their election between a suit for damages and a claim under the act. Employers of five or more who do not pay premiums into the fund are deprived, in actions against them, of the common-law defenses of the fellow-servant rule, the assumption of risk, and of contributory negligence. Where the parties are operating under the act, the injured employee, and his dependents in case of death, are compelled to accept compensation from the insurance fund in the manner provided, except in the cases above set forth."

²In this connection the court merely remarked: "We think it clear that the objects and purposes . . . which the legislature contemplated in the passage of the law in question are sufficient to sustain the exercise of the police power and the participation of the state in the manner provided. Whether the plan adopted is the most appropriate or best calculated to accomplish those objects are matters with which the court is not concerned, and the law should not be held to be invalid unless clearly in violation of some provision of the Constitution."

was that by the provisions specified: "It deprives employers of the defense by assumption of risk, and deprives the employee of part of his wages to be paid to the state insurance fund, and of the right to sue for injuries sustained." It was insisted that "while the law is apparently permissive, and leaves its operation to the election of employers and employees, it is really coercive." This argument did not prevail, because "the only right of action which the statute removes from the employee is the right to sue for negligence (which is not wilful or statutory) of his employer."³ The second particular in which it was unsuccessfully urged that the act violated the due process clauses was, that it "delegates judicial power to the board of awards, and denies recourse to the courts and trial by jury."⁴

³ The passage containing the analysis of the statute which leads up to this conclusion is as follows: "After providing in § 20-1 that an employer who elects to comply with the act shall be relieved from liability to the employee at common law, or by statute (except as provided in § 21-2) it is then enacted in § 21-1: 'All employers who shall not pay into the insurance fund . . . shall be liable to their employees for damages, . . . caused by the wrongful act, neglect, or default of the employer, his agents,' etc., and in such cases the defenses of assumption of risk, fellow servant, and contributory negligence are not available. So that an employer who elects not to come into the plan of insurance may still escape liability if he is not guilty of wrongful act, neglect, or default. His liability is not absolute as is the case of New York statute hereinafter referred to. And it cannot be said that the withdrawal of the defenses of assumption of risk, fellow servant, and contributory negligence as against an employer who does not go into the plan, is coercive, for such withdrawal is in harmony with the legislative policy of the state for a number of years past. The law known as the Norris law, passed in 1910, withdrew these defenses in the particulars covered by the law. As to the employee, if the parties do not elect to operate under the act, he has his remedy for the neglect, wrongful act, or default of his employer and agents as before the law was passed, and is not subject to the defenses named. If the parties are operating under the act, the employee contributes

to an insurance fund for the benefit of himself or his heirs; and in case he is injured or killed, he or they will receive the benefit even though his injury or death was caused by his own negligent or wrongful act, not wilful. And that is not all. Under § 21-2 if the parties are operating under the act, and the employee is injured or killed, and the injury arose from the wilful act of his employer, his officer, or agent, or from failure of the employer or agent to comply with legal requirements as to safety of employees, then the injured employee or his legal representative has his option to claim under the act or sue in court for damages."

This statute, it should be observed, expressly preserves to employees the right to sue at common law,—a feature which distinguishes it from the Washington act, reviewed in § 2852, *post*.

⁴ Discussing this objection, the court said: "Of course if the board [of awards] is a court there is an end of the whole matter. The statute would be unconstitutional. For if the board is a court it has not been created in accordance with the manner provided by the Constitution. . . . It is created by the act purely as an administrative agency to bring into being and administer the insurance fund; and the fact that it is empowered to classify persons who come under the law and to ascertain facts as to the application of the fund does not vest it with judicial power within the constitutional sense. . . . Therefore, if the board denies the claimant's right to participate in the fund on any ground going to the basis of his claim, he may, by filing

(3) "That it deprives parties of the freedom of contract and impairs the obligations of contracts." The objection of "impairment" was disposed of by the remark that the statute "can of course not affect contracts in existence and unexpired at the time it is put into operation by the employer."

(4) "That it makes an unjust and arbitrary classification, and does not affect all who are within its reason," as is required by § 26, art. 11, of the state Constitution. But the court was of opinion that the exclusion of persons employing less than five servants from the purview of the statute is reasonable and proper, because "in the nature of the case the risks of any regular employment are less and the opportunity for avoiding them better where an employee is one of four than when a number is larger." It was also declared not to be "an objection that the law applies only to workmen and operatives, and not to all others. This classification brings within the law all employees within its reason."

The court also remarked that "on account of the common law and statutory rights still preserved by the statute in cases where the election is made to come under its provisions, as well as not to do so, taken in connection with the advantage to each which the plan contemplates, we cannot say that the statute is coercive."

2852. Washington.—The industrial insurance law (see p. 5621, *ante*) has been pronounced constitutional.¹

The objections against which it was sustained were as follows:

(1) "That it violates § 3 of article 1 of the state Constitution, and

an appeal and petition in the ordinary form, be entitled to trial by jury, the case proceeding as any other suit. It is not an appeal in the sense of appealing from one court to another, but is really the beginning of an original suit.

As to this it must be remembered that the whole proceeding is with and against the board of awards. His claim is not against the employer. There is no dispute between them, his claim is for the benefits of the insurance fund. The board of awards inquires into the matters pointed out in the statute, and in case of dispute as to whether there is any ultimate right to participate at all in such fund, he has his recourse to the courts. But he is not confined to that method of proceeding. If he claims that the injury was caused by the wilful act of the employer or officer or agent, or from fail-

ure to comply with legal requirements as to safety of employees, etc., he may waive his claim under the act and sue in court for his damages. But in his petition in such case he could not claim damages for mere negligence, he having elected to waive that cause of action, having elected, as it were, to assume the risk of his employer's mere neglect in return for the benefits and protection to himself and his heirs afforded by the terms of the act."

¹*State ex rel. Davis-Smith Co. v. Clausen* (1911) 65 Wash. 156, 37 L.R.A. (N.S.) 466, 117 Pac. 1102. It was there held that the question of constitutionality might be raised by the state auditor in mandamus to compel the issuance of a warrant to the state treasurer in payment of an obligation incurred by the industrial insurance department created by the act.

the 14th Amendment to the Constitution of the United States, which provide that no person shall be deprived of life, liberty, or property without due process of law." Under this head it was argued: (1) That the act creates a liability without fault; and (2) that it takes the property of one employer to pay the obligations of another; and that the contentions thus relied upon were not without force was admitted by the court, which observed: "Since there is exacted from every employer of labor engaged in one or more of the industries termed hazardous a certain fixed sum based upon his pay roll, which is to be used to compensate employees working in such hazardous employments who receive personal injuries, regardless of the question whether the injury was because of the fault of the employer or of the negligence of the employee, it can be said that some part of the sum so collected will be paid out on injuries in which the employer is without fault; and, furthermore, since every such employer is liable to make the payments whether or not any of his own workmen are injured and since an employer is liable under the common law for an injury to his own workmen only, it can also be said that by this act one employer is held liable for the obligations of another." But the opinion was expressed that the contentions should not prevail, because the conditions adverted to "do not furnish an absolute test of the validity of the act;" its quality in this regard being determinable not with reference to the question whether it produces the given results alleged to be objectionable, but with reference to the question whether there is "reasonable ground to believe that the public safety, health, or general welfare is promoted thereby." It was laid down that the legislature is not authorized to "declare any particular industry, commonly engaged in by the people, to be unlawful which, under all circumstances, must necessarily be harmless and innocent; but it can regulate and control and prohibit any industry, however innocent it may have been in its inception, whenever it becomes a menace to the employees engaged in it, the people surrounding it, or to any considerable number of people at large, no matter from whatsoever cause the menace may arise."² The contention that the statute

² Discussing the subject from this standpoint, the court remarked that "in the statute books of the several states are many statutes held constitutional by the courts where liability is created without fault, and where the property of one person is taken to pay the obligation of another, and this where no compensation is made to the person who is thus

made liable or whose property is thus taken." It was also pointed out that the congressional legislation concerning the marine hospitals fund "clearly does everything that is charged against the statute at bar. It creates liability without fault, since it obligates the master or owner of every vessel of the United States to pay into a given fund, con-

unduly interfered with the right of contract was also rejected. The court summed up its conclusions as follows: "If, therefore, the act in controversy has a reasonable relation to the protection of the public health, morals, safety, or welfare, it is not to be set aside because it may incidentally deprive some person of his property without fault, or take the property of one person to pay the obligations of another. To be fatally defective in these respects, the regulation must be so utterly unreasonable and so extravagant in nature and purpose as to capriciously interfere with and destroy private rights. That the statute here in question has the attribute of reasonableness, rather than of capriciousness, seems incontrovertible. The evil it seeks to remedy is one that calls loudly for action. Accidents to workmen engaged in the industries enumerated in it are all but inevitable. It seems that no matter how carefully laws for the prevention of accident in such industries may be framed, or how rigidly they may be enforced, there is an element of human equation that enters into the problem which cannot be eliminated, and which invariably causes personal injuries and consequent financial losses to workmen engaged therein. Heretofore these losses have been borne by the injured workmen themselves by their dependents, or by the state at large. It was the belief of the legislature that they should be borne by the industries causing them, or, perhaps more accurately, by the consumers of the products of such industries. That the principle thus sought to be put into effect is economically, sociologically, and morally sound, we think must be conceded. . . . The common law does not purport to afford a remedy for the condition here found to exist. It affords relief to an injured workman in only a limited number of cases; cases where the injury is the result of fault on the part of the employer and there is want of fault on the part of the workmen. For the greater number of injuries traceable to the dangers incident to industry, no remedy

trolled by the government, a fixed sum for the benefit of sick and disabled seamen, regardless of the fact whether or not the vessel of the master or owner making the payment has any sick or disabled seaman who take advantage of the fund; and it takes the property of one to pay the obligations of another, since the fund is disbursed in the cure of sick and disabled American seamen generally, regardless of the fact whether or not the expense of their cure exceeds the sum paid in by the master or owner of the vessel from which they came. Whatever may be said as to the foundation

of the liability of the master or the owner of a vessel, or the vessel itself, to answer for the expense of the cure of sick and disabled seamen while in service of the ship, the foundation of this liability is purely statutory; and, if the objection that is made to present statute were sufficient to condemn it, the statute is in violation of the 5th Amendment to the Constitution of the United States." Reference was also made to the Washington statutes regulating employment in respect of the number of hours that servants shall be permitted to work as well as in various other particulars.

at all is afforded. The act, therefore having, in its support these economic and moral considerations, is not unconstitutional for the reasons suggested upon this branch of the argument."

(2) "That it violates § 12 of article 1 of the state Constitution, which provides that no law shall be passed granting to any citizen, class of citizens, or corporations other than municipal privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations; and the 14th Amendment to the Constitution of the United States, which provides for the equal protection of the laws."³

³ The court said: "It is well settled that neither the clause of the state Constitution prohibiting class legislation, nor the clause of the 14th Amendment to the Constitution of the United States relating to the equal protection of the laws takes from the state the power to classify in the adoption of police regulations. The limitations imposed admit of a wide discretion in this respect, and avoid only what is done without any reasonable basis; that is, such regulations as are in their nature arbitrary. The learned counsel for the auditor recognize this distinction, and consequently do not attack the act because it is confined to extrahazardous occupations as its field of regulation, but complain because its benefits are not confined to workmen injured while engaged in such occupations. It is claimed that the act allows workmen employed in such industries the benefit of the act when injured outside of the line of their duties, or when engaged in the business of the concern in a capacity not affected by the peculiar hazards of the business. We have quoted enough of the statute to show that it is somewhat obscure in these respects. But we are not inclined to think the point fatal to the act, even though we concede counsel's interpretation of it to be the correct one. In § 27 the legislature has made it clear that it did not intend the provisions relating to those who are entitled to partake of its benefits to be so far an integral part of the act that it could not be eliminated in part without destroying the act in its entirety. It is there expressly provided that the adjudication of invalidity of any part of the act shall not affect the validity of the act as a whole or any other part thereof. This means that the legislature intended the act to be en-

forced as far as it may be, even though it might not be valid in its entirety. It was competent for the legislature so to provide. Anything it could have eliminated itself and left an operative act can be eliminated by the courts without destroying the entire act, if it is the will of the legislature that the remaining parts of the act shall stand after such elimination. . . . Again, it is said that the act violates the provisions relating to class legislation because it diverts the contributions exacted from the numerous industries to the relief of a particular class of injured and disabled workmen, instead of applying it to the relief of injured workmen generally, or applying it to the use of the state at large. But to divert the money collected in this manner to a special use is one of the prerogatives of legislation. The right of the state to regulate any form of industry arises from the fact that its pursuit affects injuriously the health, safety, morals, or welfare of the persons engaged in it, or is inimical in some form to some portion of the individuals of the community. It is not necessary that it always affect injuriously the public at large. On the contrary it may be regulated if it affects injuriously those engaged in it, or those brought in contact with it, even though its pursuit may benefit generally the people of the state at large. Nor is there any particular form which the regulation must take. The conduct of the business may be prohibited entirely in a particular place or in a particular manner; its pursuit may be restricted to certain hours of the day; it may be permitted to be conducted only in case protective devices are used; or it may be permitted in certain forms, and a sum of money exacted from the indi-

(3) That it violates §§ 1 and 2 of article 7 of the state Constitution, which provide that property shall be taxed according to its value in money, and that all taxation shall be equal and uniform.⁴

(4) "That it violates § 21 of article 1 of the state Constitution, which provides that the right of trial by jury shall remain inviolate."⁵

viduals carrying it on, for the purpose of recompensing those who suffer losses because thereof. So, in this instance, if the legislature believed that to permit the pursuit of the industries named after the present manner of conducting them was generally for the public good in spite of the losses the method of pursuit entailed, there is no reason why it should not confine its regulations to compelling the owners and conductors of such industries to create a fund out of which the losses caused thereby should be made good. That legislation in this form is not class legislation, nor a denial to owners of property of the equal protection of the laws, is well sustained by authority."

⁴ The court said: "As the charge laid on the persons engaged in the industries named in the act is a pecuniary burden imposed by public authority, it partakes of the nature of a tax, and, in the language of a distinguished judge discussing a similar question, 'for many purposes might be so spoken of without harm.' But it is manifest that it is not a tax in the sense the word is used in the sections of the Constitution to which reference is here made. No accession to the public revenue, general or local, is authorized or aimed at. The purpose of the exaction is entirely different. It is to be used, not to meet the current expenses of government, but to recompense employees of the industries on whom the burden is imposed for injuries received by them while engaged in the pursuit of their employments. It is the consideration which the owners of the industries pay for the privilege of carrying them on. It is therefore in the nature of a license tax, and can be justified on the principle of law that justifies the imposition and collection of license taxes generally. In this state, such taxes may be imposed, either as a regulation or for the purposes of revenue, the only limitation upon the power being that such taxes, when imposed on useful trades and industries, shall not be unreasonable; and if a class of trades or industries is

selected from the whole and the tax imposed upon the class selected alone rather than upon the whole, that there be some reasonable ground for making the distinction. . . . The grounds upon which the employer may be held to contribute to a fund for the relief of all injuries sustained by his employees, whatever the cause, we have already stated. The obligation of the employee to accept the conditions of the statute can rest on like grounds: namely, the welfare of the state. The relation being one of contract between employer and employee, the state may make it a condition of the contract that the employee shall accept a fixed sum for any injury he may receive while engaged in the employment, whether the injury be the result of the inherent dangers of the employment or the result of some fault of his employer."

⁵ The court said: "It is said that the legislature cannot fix a procrustean rule for the admeasurement of damages arising from injuries received by one in the employment of another, as the employer and the employee alike have the right to submit to a jury both the question of the right to recover for any such injury, and the question of the amount that may be recovered therefor. But we cannot think the rule absolute. It may be that the legislature cannot fix the amount of recovery, or provide for an absolute recovery, in all cases where one person is injured by another, regardless of the relation of the parties, or the question whether the injury is or is not the result of negligence; but it does not follow that it may not so provide where the injury happens in that class of employments subject to legislative regulation and control. If it be, as we have attempted to show, a proper regulation of hazardous industries to compel those engaged therein as owners or operators to pay a fixed sum into a fund to be used for the purpose of compensating the employees thereof for injuries received by them, it is difficult to understand why it is not also proper regulation to require the employees of such

The contention that the act is invalid as being coercive in its operation was rejected, for the reason that it accords employers and employees the option of coming under its provisions or retaining their common-law rights.⁶

2853. Wisconsin.—The workmens' compensation act (see p. 5639, *ante*) has been pronounced constitutional.¹ It was sustained against the following objections:

(1) "That the . . . section abolishing the defenses of assumption of risk and negligence of a fellow servant is void, because,

industries to accept a given sum for any injury that they may receive while so engaged. The same power that authorizes the state to regulate the participation of the one in the particular industry would seem to authorize it to regulate the participation of the other therein. . . . The objection may be answered also in another way. The Constitution does not undertake to define what shall constitute a cause of action, nor to prohibit the legislature from so doing. The right of trial by jury accorded by the Constitution, as applicable to civil cases, is incident only to causes of action recognized by law. The act here in question takes away the cause of action, on the one hand, and the ground of defense, on the other; and merges both in a statutory indemnity, fixed and certain. If the power to do away with a cause of action in any case exists at all, in the exercise of the police power of the state, then the right of trial by jury is thereafter no longer involved in such cases. The right of jury trial being incidental to the right of action, to destroy the one is to leave the other nothing upon which to operate."

⁶The court observed: "If there should be such general acceptance of and compliance with the statute as its framers hope for, so as to bring a large part of the labor employed in the industrial enterprises of the state within its influence and operation, that would not demonstrate its coercive character, on the contrary it would justify the enactment." *State ex rel. Yapple v. Creamer*, 85 Ohio St. 349, 39 L.R.A. (N.S.) 694, 97 N. E. 602.

¹*Borgnis v. Falk Co.* (1911) 147 Wis. 327, 37 L.R.A. (N.S.) 489, 133 N. W. 209. The general purport of the act was thus summarized by the court: "It creates an administrative board to car-

ry its provisions into effect: it divides all private employers of labor into two classes: (1) Those who elect to come under the law, and (2) those who do not so elect; it takes away the defenses of assumption of risk and negligence of a coemployee from the second class (except that where there are less than four coemployees the latter defense is not disturbed), but leaves both defenses intact to the first class; it prescribes the manner in which an employer may elect to come under its terms, and how an employee may make his election, and when silence on the part of the employee will be considered an election, but it does not in terms compel either employer or employee to submit to its provisions. It then provides a comprehensive scheme by which, after both parties have so elected, any substantial injury, whether the result be fatal or not, received by the employee in the course of or incidental to his employment (except those caused by wilful misconduct) shall be compensated for by the employer according to certain definite rules, which rules are to be administered by the administrative board aforesaid by means of simple procedure definitely laid down, which gives to both parties fair notice and hearing, and results in findings and an award which may be filed in the circuit court and become a judgment. It further provides that the findings of fact shall be conclusive, and the award subject to review only by action in the circuit court for Dane county, in which it can be set aside only (1) if the commission acted without or in excess of its powers, (2) if the award was procured by fraud, or (3) if the award is not supported by the findings of fact. It then provides that the judgment thus rendered shall be subject to appeal to the supreme court."

. . . public policy does not require their abrogation in any but the hazardous trades, it being admitted that in these last-named trades these defenses may properly be abolished.”²

(2) That this provision is improperly discriminative, in that “the

² The court said: “When acting within constitutional limitations, the legislature settles and declares the public policy of a state, and not the court. True, where the legislature has not spoken on a subject and the courts in the course of their duty have declared the principle of common law applicable thereto, public policy may be truly said to be thus created; but any public policy thus created by the courts may be at any time reversed or changed by the legislature, provided it act within constitutional lines. The people, acting directly by means of referendum or through their representatives in constitutional conventions or legislative bodies, are the makers of public policy, and it is only when the people have failed to speak in these methods that the courts can be said to have power to make public policy by decision. A constitutional statute cannot be *contrary* to public policy,—it *is* public policy. The contention that a statute is unconstitutional because it is against public policy amounts to nothing more than a contention that it is unconstitutional, hence we address ourselves directly to that question and thereby gain something in clearness of thought. The two defenses which the legislature has thus attempted to take away are not entrenched behind any express constitutional provision, nor were they originally created by legislative action. They were both evolved by the courts. At a time when industries of all kinds were comparatively simple and free from danger, when employees of a common master were few in number and generally acquainted with each other, and when a personal injury action was a rarity, it was thought not to be unreasonable that an employee should assume those simple risks which were plainly before him, and should not be heard to complain if he were injured by the careless act of a fellow workman by whose side he had continued to work when he must have well known the nature and habits of the man. The precedent once made was generally followed, until it became but-

tressed by a multitude of decisions in practically all of the jurisdictions whose jurisprudence is founded upon the English common law. But, as has been pointed out earlier in this opinion, the conditions surrounding employer and employed have vastly changed during the last half century, and now the legislature, having become convinced that new conditions call for a change in rules of liability, have declared that such a change shall be made. They have changed the rule established by the courts, because they deem another rule better fitted to deal with the problems of the time, or, in other words, because they deem it best to establish a changed public policy. It is frankly admitted by appellant that it is within the legislative power to make this change with regard to the hazardous trades, but not with regard to what are called the non-hazardous trades. But why not? There are, of course, some occupations which are exceptionally hazardous, and it may well be that it would be within legislative discretion to classify these very hazardous occupations and remove the defenses as to them, while retaining them as to others less hazardous. Indeed, that very thing has been done and has been approved by the courts in this and many other states, especially in the case of railroads and to some extent with other industries. . . . But because there is room for classification it does not follow that legislation without classification is unconstitutional. There are hazards in all occupations; indeed they follow every man from the cradle to the grave. What constitutional requirement, either express or implied, clothes these court-made defenses with exceptional sanctity as to the less hazardous industries, and warns off from them the sacrilegious hand of the legislature? We are referred to none, and we know of none. It is admitted in the *Ives Case* [§ 2850, *ante*] that there may be a less persuasive reason for the change in the case of the latter class of industries, but this does not deprive the legislature of the power to make it.”

two defenses are preserved intact to employers who elect to come under the law and taken away from those who do not so elect.”³

(3) That the minor classification by which the defense of coservice is preserved in respect of all employers having less than four employees in a common employment has no proper legal basis.⁴

³ The court said: “The rules governing classification are familiar and are in brief as follows: It must be based on substantial distinctions which make real differences; it must be germane to the purposes of the law; it must not be limited to existing conditions only; and must apply equally to each member of the class. It seems to us that this classification fully meets these requirements. Certainly there will be very real differences between the situation of the employer who elects to come under the law and the employer who does not. If the consenting employer only employs workmen who also elect to come under the law, he can never be mulcted in heavy damages, and will know whenever an employee is injured practically just what must be paid for the injury. Surely this is a different situation from the situation of the man who is liable to be brought into court by an injured employee at any time and obliged to defend common-law actions upon heavy claims unliquidated in their character, the outcome of which actions none can foretell. On the other hand, if, as seems quite likely, the greater part of the consenting employer’s workmen consent, but some do not, and these latter are still retained in the employment, the same considerations will apply with somewhat less force. On the one hand there is a class of consenting employers employing wholly or largely consenting workmen, and having definite and fixed obligations to their workmen in case of injury. On the other hand, is a class of nonconsenting employers who have no such fixed obligations in case of injury to their workmen, but choose to meet every such workman in court and fight out the question of liability. There seems a very robust difference between these two classes. But after all there is another distinction which seems perhaps more satisfactory: the consenting employer has done his share, and it must be considered a considerable share, in rendering successful the legislative attempt to meet and solve a difficult social and economic problem. Even if

it be true (which, as before stated, is not decided) that he may not be compelled under our Constitutions, state and national, to assist in the solution of this problem, still does not his voluntary act in giving that assistance constitute a substantial distinction, making a real difference of situation between him and the employer who refuses his aid,—a difference which justifies a difference in treatment? It seems to us that this question must be answered in the affirmative, and if it be so answered there can be no doubt as to the legitimacy of the classification, for the reason that it is quite apparent that the other conditions of valid classification are fully satisfied. There can be no doubt that the classification is germane to the purpose of the law, and it is not limited in its application to existing conditions only, and applies equally to each member of the class.”

⁴ The court said: “It seems to us that the grounds of classification here are more persuasive even than in the case just discussed. The man who is employed with one or two other men in a given employment, in all reasonable probability knows their characteristics well, and will probably be with them a great part of the time. He will have ample opportunity to form a just judgment as to the risk of injury from their negligence which he will run if he works with them, and will be enabled to shape his own conduct accordingly; but the man who is one of a large number of men, many of whom he never sees, and some of these latter having duties to perform in distant places upon the due performance of which his own safety depends, has no opportunity to acquire any accurate knowledge of the characteristics of many of his fellow workmen, and cannot intelligently decide what risk he runs at the hands of such distant and unknown employees. The difference in situation is not merely fanciful,—it is real. In one case the employee knows or has the means of knowing what to expect from his co-laborers; in the other case, he has

(4) That the law, while in its words presenting to employer and employee a free choice as to whether he will accept its terms or not, is in fact coercive, so that neither employer nor employee can be said to act voluntarily in accepting it.⁵

(5) That the law "vests judicial power in a body which is not a court, and is not composed of men elected by the people, in violation of those clauses of the state Constitution which vest the judicial power in certain courts and provide for the election of judges by the people, as well as in violation of the constitutional guaranties of due process of law."⁶

neither the knowledge nor the means of knowledge. Of course, there will be cases on the border line where the difference in situation will be very slight, or perhaps entirely nonexistent. There will probably be no practical difference between the situation of the man who is one of four or five employees in a given employment and the situation of the man who is one of three, but this does not militate against the legitimacy of the classification; this is a necessary defect in all cases of classification based upon numbers. The question is not whether there may be some on one side of the line whose situation is practically the same as that of some on the other side, but whether there is a distinction between the classes as classes, whether there are characteristics which, in a greater degree, persist through the one class than in the other which justify legal discrimination between them.' *State v. Evans* (1907) 130 Wis. 381, 110 N. W. 241."

⁵ The court said: "As to the employer, the argument is that the abolition of the two defenses is a club which forces him to accept; and as to the employee, the argument is that if his employer accepts the law the employee will feel compelled to accept also through fear of discharge if he do not accept. Both of these arguments are based upon conjecture. Laws cannot be set aside upon mere speculation or conjecture. The court must be able to say with certainty that an unlawful result will follow. We do not see how any such thing can be said here. No one can say with certainty what results will follow in the practical workings of the law. It may well be that many manufacturers, especially those employing small numbers of employees and in the

less dangerous trades, will deliberately conclude that it will be better business policy to exercise greater care in guarding their employees from possible danger and greater discrimination in the employment of careful men, and reject the law entirely, running the risk of being able to prevent all or nearly all accidents. It seems extremely probable that the great bulk of workmen, especially of the unskilled classes, will be glad to come under the act, and thus secure a certain compensation in case of injury, in place of that very uncertain and expensive thing: namely, the final result of a lawsuit. But whether this be so or not, it may be considered as reasonably certain that very many will elect to come under the act voluntarily and freely, and that those who do not will probably come from the ranks of skilled labor, who will deem the rates of compensation under the law as entirely inadequate, or will be careful workmen in the less dangerous trades who will see no gain in bartering their common-law rights for the restricted remedies furnished by the statute. It cannot be said with any certainty that such men will be discharged for their failure to voluntarily come under the law. The probability would seem rather to be that they would be of a class which the employer would wish to keep in his employ, notwithstanding their attitude toward the law. These matters are, however, purely speculative and conjectural; none can say what the practical operation of the law will be. It is enough for our present purpose that no one can say with certainty that it will operate to coerce either employer or employee."

⁶ The court said: "It was suggested at the argument that the industrial

(6) "That even if it be held that the act is not coercive, still when employer and employee consent to come under the law they in effect wholly stipulate away their rights to resort to the courts, and that such agreements are void."⁷

(7) "That the act compels municipalities to levy taxes for other than public purposes, since all workmen injured in the employ of the public are to be compensated, and thus taxpayers will be deprived of their property without due process of law."⁸

Other points determined were these:—that the statute does not impair the obligation of contracts of service entered into before its enactment;⁹ that as the industrial commission is merely an administrative board, not a court, the clauses which provide for the giving of notice of claim by mail, and allow testimony to be taken without notice to either party, are valid; that, as the legislature may endow minors with the right to make contracts otherwise lawful, the provision which declares that a minor who is legally entitled to work shall have the same power of contracting for service as an adult is not invalid;

commission might, perhaps, be held to be a court of conciliation, as authorized to be created by § 16 of art. VII. of the state Constitution, but we do not find it necessary to consider or decide this contention. We do not consider the industrial commission a court, nor do we construe the act as vesting in the commission judicial powers within the meaning of the Constitution. It is an administrative body or arm of the government which, in the course of its administration of a law, is empowered to ascertain some questions of fact, and apply the existing law thereto, and in so doing acts quasi judicially, but it is not thereby vested with judicial power in the constitutional sense."

⁷ Referring to the case cited in support of this contention, *Fox v. Masons' Fraternal Acci. Asso.* (1897) 96 Wis. 390, 71 N. W. 363, the court said that it "recognizes the companion principle that agreements to arbitrate special matters, such, for instance, as the amount of the loss under an insurance policy (or, as in the present case, the extent of an injury or disability, and the like), which do not go to the whole groundwork of the controversy, are universally sustained. As we have seen, these special matters are the only matters which the board may conclusively decide under this law. If there be a

controversy as to fundamental rights, namely, whether the parties have consented, or as to whether the injuries resulted from wilful misconduct, these issues are still open to the court upon the appeal."

⁸ The court said: "The manner in which the state or the public shall treat its workmen is peculiarly a matter for the legislature to determine. No one is compelled to work for the public, and, if he does, he takes his situation on the terms which the public gives. We know of no reason why the public, acting by its lawmaking power, may not provide that its employees shall have as part of their compensation certain indemnities in case of accidental injury in the public service. When a law does so provide, the raising of the funds to discharge those indemnities becomes plainly a proper public purpose."

⁹ The court said (p. 366): "The right to bring an action in the future in case of a possible tort not yet committed is no part of the contract of employment. That right arises out of the relation of employer and employee, and is subject to change by the law-making power at any time. The employee does not contract that it shall remain intact. There is no vested right in a mere remedy for a hypothetical wrong."

that the legislature might properly provide that certain parts of the act were separable, in such a sense that their judicial invalidation should not affect the constitutionality of the remaining parts.

The court observed that, as the law is not a compulsory one, there was no necessity to consider the question whether a compensation act which is compulsory "offends against those clauses of the state and Federal Constitutions which guarantee all citizens against the deprivation of property without due process of law."

2854. Concluding remarks.— The elaborate disquisitions in the cases reviewed in the preceding sections may be said to have definitely established the doctrine that a workmen's compensation act applicable either to all description of employment, or only to those of a specially dangerous character, is constitutional if it is drawn in such a form as to leave to the employees within its purview the option of accepting the system of indemnities provided by it, or of preserving their **rights of action** under the common law. It may be observed, moreover, that, apart from the constitutional aspect of the matter, it is apparently not in the public interest that those views should not find acceptance. The desirability of preserving common-law actions, as one of the remedies of injured servants, is strongly indicated by the consideration that schemes of industrial insurance which place all employers on a level, irrespective of the manner in which their business is carried on, may yet be found to have a mischievous tendency to lower the average measure of diligence exercised in respect of the instrumentalities and system of work upon which the **safety of employees** depends.

H. ENACTMENTS IMPOSING SPECIFIC DUTIES UPON MASTERS FOR THE PROTECTION OF THEIR SERVANTS.

2855. Generally.—All the courts are agreed that statutes designed to promote the health and secure the personal safety of employees engaged in certain occupations are within the constitutional competence of the legislature.¹ This doctrine is accepted even by the courts which are the most strongly inclined to circumscribe the scope of the police power. In fact, it is obviously involved in the general conception of that power as it has been defined by judges and text writers.

Some of the statutes belonging to this category are considered in the sections of the present chapter in which the regulation of the hours of work is discussed.

2856. Enactments relating to manufacturing establishments.—It is now well settled that the enactment of statutes designed to protect the health or safety of employees in factories is a valid exercise of the police power.¹ This doctrine has been affirmed in relation to a factory act, viewed as a whole;² and also with respect to particular provisions concerning the ventilation of buildings;³ the guarding of

¹ "There can be no doubt but that the legislature may regulate the business of mining and manufacturing so as to secure the health and safety of the employees." Black, J., *arguendo*, in *State v. Loomis* (1893) 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350.

"It cannot be questioned that in the exercise of its police power, the legislature may enact laws to protect the health and safety of our citizens by all reasonable regulations; and when a given subject is within that power, the extent to which it is to be exercised is within the discretion of the legislature." *State v. Whitaker* (1900) 160 Mo. 59, 72, 60 S. W. 1068.

¹ In *Lohmeyer v. St. Louis Cordage Co.* (1908) 214 Mo. 685, 113 S. W. 1108, the constitutionality of the Missouri factory law as a whole was affirmed; but no particular points were discussed.

"It is no invasion of the right of the employer freely to contract with his employee to provide by general law that all employers shall furnish a reasonably safe place and reasonably wholesome surroundings for their employees. The legislature, . . . may require the owners of factories and workshops to

put their buildings in proper condition as to sanitation,—may require them to provide reasonable safeguards against danger for the operatives." *Schaezlein v. Cabaniss* (1902) 135 Cal. 466, 470, 56 L.R.A. 733, 87 Am. St. Rep. 122, 67 Pac. 755. As to the particular point determined in this case, see note 7, *infra*.

² *State v. Vickers* (1904) 186 Mo. 103, 84 S. W. 908, 2 Ann. Cas. 779.

³ *People ex rel. Williams v. Eno* (1909) 134 App. Div. 527, 119 N. Y. Supp. 600. The court quoted the following statement of principles in *Health Department v. Trinity Church* (1895) 145 N. Y. 32, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833: "The legislature, in the exercise of this power, may direct that certain improvements shall be made in existing houses at the owners' expense, so that the health and safety of the occupants and of the public through them may be guarded. These exactions must be regarded as legal so long as they bear equally upon all members of the same class and their cost does not exceed what may be termed one of the conditions upon which individual property

machinery;⁴ and the installations of appliances for carrying away dust generated by the processes carried on.⁵ Consequently a statute of this type will not be annulled unless it is shown to be open to some

is held. It must not be an unreasonable exaction, either with reference to its nature or its cost. With this reasonable restriction the power of the state may, by police regulations, so direct the use and enjoyment of the property of the citizen that it shall not prove pernicious to his neighbors or to the public generally. . . . One of the late instances of this kind of legislation is to be found in the law regulating manufacturing establishments. Laws of 1887, chap. 462. The provisions of that act could not be carried out without the expenditure of a considerable sum by the owners of a then-existing factory. . . . Has the legislature no right to enact laws such as this statute regarding factories unless limited to factories to be thereafter built? . . . I think to so hold would be to run counter to the general course of decisions regarding the validity of laws of this character, and to mistake the foundation upon which they are placed."

⁴*Lore v. American Mfg. Co.* (1901) 160 Mo. 608, 61 S. W. 678; *Casper v. Lewin* (1910) 82 Kan. 604, — L.R.A. (N.S.) —, 109 Pac. 657.

⁵*People v. Smith* (1896) 108 Mich. 527, 32 L.R.A. 853, 62 Am. St. Rep. 715, 66 N. W. 382 (Laws 1887, No. 136). The court said: "As is implied by what has been said, the constitutional right to use property without regulation is plain, unless the public welfare requires its regulation. If the public welfare does require it, the right must yield to the public exigency. And it is upon this question of necessity that the third question depends. All, then, seems to be embraced in the question of necessity. Unless the emery wheel is dangerous to health, there is no necessity, and consequently no power, to regulate it. Unless the blower is a reasonable and proper regulation, it is not a necessary one. Who shall decide the question, and by what rule? Shall it be the legislature or the courts? And, if the latter, is it to be determined by the evidence in the case that happens to be first brought, or by some other rule? Does it become a question of fact to be submitted to the jury or decided by the court? Of all the devices known

to human tribunals the jury stands pre-eminent in its ability to determine cases in direct violation of and contrary to law, without impairing the binding force of the law as a rule of future action. We have known of instances where the question of the constitutionality of acts, as applied to the particular case on trial, has been made to depend upon the finding of the jury upon the facts in the case. But there is a manifest absurdity in allowing any tribunal, either court or jury, to determine from testimony in the case the question of the constitutionality of the law. Whether this law invades the rights of all the persons using emery wheels in the state is a serious question. If it is a necessary regulation, the law should be sustained; but, if an unjust law, it should be annulled. The first case presented might show by the opinions of many witnesses that the use of the dry emery wheel is almost necessarily fatal to the operative, while the next might show exactly the opposite state of facts. Manifestly, then, the decision could not settle the question for other parties, or the fate of the law would depend upon the character of the case first presented to the court of last resort, which would have no means of ascertaining whether it was a collusive case or not, or whether the weight of evidence was in accord with the truth. It would seem, then, that the questions of danger and reasonableness must be determined in another way. The legislature, in determining upon the passage of the law, may make investigations which the courts cannot. As a rule, the members (collectively) may be expected to acquire more technical and experimental knowledge of such matters than any court can be supposed to possess, both as to the dangers to be guarded against and the means of prevention of injury to be applied; and hence, while under our institutions the validity of laws must be finally passed upon by the courts, all presumptions should be in favor of the validity of legislative action. If the courts find the plain provisions of the Constitution violated, or if it can be said that the act is not within the rule of necessity in view of facts

particular constitutional objection; as that it is class legislation,⁶ or that it confers upon an official "the power to make a law for the individual, and to enforce such rules of conduct as he may prescribe."⁷

of which judicial notice may be taken, then the act must fall; otherwise it should stand."

In *Schaezlein v. Cabaniss* (1902) 135 Cal. 466, 56 L.R.A. 733, 87 Am. St. Rep. 122, 67 Pac. 755, such an enactment was declared to be within the scope of the police power, but it was annulled on the special ground stated *infra*.

⁶ In *People v. Smith* (1896) 108 Mich. 527, 32 L.R.A. 853, 62 Am. St. Rep. 715, 66 N. W. 382, it was held that a statute requiring the use of a blower to carry away the dust arising from the use of emery wheels was not rendered invalid, as between operatives, by the fact that it permitted certain uses of a dry emery wheel without a blower.

In *State v. Miksicek* (1910) 225 Mo. 561, 135 Am. St. Rep. 597, 125 S. W. 507, the provision in Mo. Rev. Stat. 1899, § 10,089 (Anno. Stat. 1906, p. 4600), to the effect that all rooms or buildings occupied as biscuit, bread, or cake bakeries shall be drained and plumbed in a manner to conduce to the proper and healthful sanitary condition thereof, and constructed with air shafts, windows, or ventilating pipes sufficient to insure ventilation, was annulled on the ground thus stated: "The defect in the legislation as enacted by § 10,089, upon which the second count of the information in the case at bar is predicated, is apparent from the fact that the application of the provisions of that section is limited to biscuit, bread, or cake bakeries, and they have no application whatever to pie and pastry bakeries and confectioneries or to cracker bakeries. Section 10,088 embraces every line of product in the class of bakeries, and § 10,089 only embraces a portion of such line of products; hence, it follows that the law requires sanitation of the buildings and rooms of the bread, biscuit, and cake bakeries, but that the proprietors and owners of the buildings of the pie, pastry, and cracker bakeries are exempt from its operation. It is but common knowledge that in large cities pie and pastry bakeries are quite numerous and have many persons in

their employ, and the same reasons for keeping the buildings and rooms occupied by that class of bakeries in a proper sanitary condition are as essential as in the rooms and buildings where the product is that of bread, biscuit, and cake."

In *State v. Vickens* (1904) 186 Mo. 103, 84 S. W. 908, 2 Ann. Cas. 779, the factory inspection law of Missouri was sustained against the objections that, by providing for the collection of fees for the prescribed inspection and certificate of inspection, it imposes a burden of taxation for the maintaining of the inspection department upon one class of citizens, and discriminates against said class; that it operates so as to take money and liberty from manufacturers without due process of law, and denies to them the equal protection of the laws, and that it discriminates against city manufacturers, and places greater burdens upon them than upon country manufacturers. The court said: "As a police regulation, the state has the unquestioned right to exact and demand an inspection fee for the inspection and certificate of inspection required by the act. It has never been ruled that an inspection fee pure and simple is a tax upon property. . . . The inspection fee of \$1 for the inspection and certificate is so manifestly reasonable that it is clear that it is not objectionable on that ground. The very mention of an inspection law suggests the exercise of police power by the state, and the requirement that the persons or things inspected shall pay for it."

⁷ In *Schaezlein v. Cabaniss* (1902) 135 Cal. 466, 56 L.R.A. 733, 87 Am. St. Rep. 122, 67 Pac. 755, the court invalidated a California enactment of the following tenor: "If in any factory or workshop any process or work is carried on by which dust, filaments, or injurious gases are generated or produced that are liable to be inhaled by the persons employed therein, and it appears to the commissioner of the bureau of labor statistics that such inhalation could, to a great extent, be prevented by

2857. Enactments relating to railways.—*a. Number of men in train crews.*—By the Supreme Court of the United States it has been held that the Arkansas act which provides that no railroad company or officer of court, owning or operating a line of railroad, shall equip a freight train with a crew consisting of less than an engineer, a fireman or conductor, and three brakemen, and excepts from its purview railroads less than 50 miles in length, is not objectionable, as denying to the operators of other railroads the equal protection of the laws.¹

b. Protection of employees operating street railways against inclement weather.—In every jurisdiction in which the question has

the use of some mechanical contrivance, he shall direct that such contrivance shall be so provided, and within a reasonable time it shall be so provided and used." The following remarks were made: "Under the law here in question it matters not how unwholesome, how dangerous, how unsanitary the condition of any factory or workshop may be, the proprietor is guilty of no offense until the commissioner of the bureau of labor statistics has required him to use appliances which the commissioner himself shall designate, and he has refused so to do. Nor does it matter if the condition of such a workshop be reasonably wholesome for the uses of the operatives, if 'dust, filaments, or injurious gases' are 'liable to be inhaled' (and it is here the mere liability, and not the fact, of inhalation, which invites the action of the commissioner); and if, in the opinion of the commissioner, such liability to inhalation could 'to a great extent' be prevented, he may designate and prescribe the kind of appliance which, in his judgment, is suitable for such purpose, and it must be employed. But the judgment of the commissioner is not only the determinative factor in the proposition as to whether or not the condition of the factory may be improved 'to a great extent,' but under this law it is absolutely conclusive and binding upon the question of the appliances to be used, and thus it may result, as to three factories similarly situated, which, as to sanitation or the danger from inhalation, are in precisely the same condition, that the proprietor of one may be guilty of no offense, because he has not been notified by the commissioner to adopt any appliance, the proprietor of the second may be

called upon to put into use some appliance at a trifling cost, while the proprietor of the third may have imposed upon him an expense for apparatus amounting to thousands of dollars. In short, arbitrarily and within the declaration, not of the legislature, but of the commissioner, no burden whatever may be imposed upon one institution, while the other, in obedience to this law, may be subjected to a most onerous and even destructive expense. The legislature, as we have said, may require the owners of factories and workshops to put their buildings in proper condition as to sanitation, may require them to provide reasonable safeguards against danger for the operatives, but it may not leave the question as to whether and how these things shall be done or not done to the arbitrary disposition of any individual."

In *State v. Vickens* (1904) 186 Mo. 103, 84 S. W. 908, 2 Ann. Cas. 779, the contention that a factory act which provides for the appointment of inspectors, makes it their duty to inspect all factories, and requires them to give the proprietors a certificate of the result of such inspection, was invalid, as vesting judicial and legislative powers in the inspectors, was declared to be "clearly without merit," inasmuch as "their duties are ministerial, involving only that discretion which every ministerial officer must exercise in the discharge of his duties, and are in no sense judicial or legislative, as those terms are understood in our system of laws."

¹ *Chicago, R. I. & P. R. Co. v. Arkansas* (1911) 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275, affirming (1908) 86 Ark. 412, 111 S. W. 456.

been raised, the statutes by which street railway companies are required to provide inclosures in front of their cars, for the purpose of protecting the employees who operate them from the inclemency of the weather during the winter season, have been pronounced a valid exercise of the police power.²

The Minnesota enactment, which is applicable to electric, cable, or steam cars, has been upheld against the following objections: (1) That it is improper class legislation; (2) that it impairs the obligation of a contract; (3) that it interferes with the liberty of contract between street railway companies and their employees; (4) and that it imposes an excessive fine.³

² See cases cited in following notes.

³ *State v. Smith* (1894) 58 Minn. 35, 25 L.R.A. 759, 59 N. W. 545 (Laws 1893, chap. 63). The court said: "What are called 'trailing cars' are excluded from this requirement, so that it applies only to cars on which the motive power is operated or controlled. The law was passed with reference to the fact that the man operating or controlling the motive power of such cars was required to stand where his person was almost wholly exposed to cold, storm, and wind, having but little protection except such as the clothing affords. . . . It is stipulated as a fact, what everybody knows, that electric cars are run at a rate of speed of from 4 to 15 miles an hour, and at an average rate of between 8 and 9 miles an hour. Anyone acquainted with the extreme cold of much of the weather in this climate between the 1st of November and the 1st of April, and who knows, as everybody does, that the motorman on an electric car is obliged to stand in one place, always on the alert, his whole attention given to the means of controlling the motive power and the brake, and to looking out ahead, and unable, with due regard to his duties, to give attention to protecting himself from the cold, must appreciate that, when going at the rate of 8 or 9 miles an hour, perhaps against a head wind, and with the mercury below zero, the position of the motorman is one not merely of discomfort, but of actual danger to health, and sometimes to life, and the tendency of which is to disable him to some extent to perform his duties in the way that care to safety of his passengers and of travelers on the streets requires. It has never been

questioned that the police power of the state extends to regulating the use of dangerous machinery, with a view to protecting, not only others, but those who are employed to use it; and if it be conceded, as it must be, that the state may intervene by regulations in such a case, we do not see why it may not in such a case as this. The act is within the police power. When a subject is within that power, the extent to which it shall be exercised and the regulations to effect the desired end are generally wholly in the discretion of the legislature. The legislature might in this case have required the use of the prescribed inclosure only at such times when the cold reached a certain degree, or when storms prevailed; but it was thought fit to make sure of the result aimed at by covering the time of year when extreme cold and bitter storms may occur at any time; and that was within its exclusive province. The objection that this is class legislation is based on the fact that the act is confined to street cars propelled by cable, steam, or electricity, and does not include street cars drawn by mules and horses or carriages or wagons; and it is assumed that here is an attempt at purely arbitrary classification for the purpose of the act. The evil sought to be remedied does not exist in case of the slowly going mule or horse car, or carriage or wagon, to the same degree as in the case of cable, electric, or steam cars. But where an evil exists in a variety of cases, it is a sufficient ground for classification in legislating, so as to include some and exclude others, that in the former the evil can be remedied, while in the latter it cannot be. The man in control of the cable, electric, or steam

The Missouri enactment has been attacked without success on the ground that, being applicable only to electric cars, it contravenes the clause in the state Constitution which prohibits the passage of special laws in cases where general laws can be made applicable.⁴

The Ohio enactment of a similar tenor has been held not to be in conflict with the clause of the state Constitution which declares that "all laws of a general nature shall have a uniform operation throughout the state," nor with the 14th Amendment to the Constitution of the United States.⁵

The Texas enactment which makes it unlawful for any corporation or receiver operating any electric street railway to require or permit the operation of cars during certain months unless the for-

railway car may be boxed in without impairing his power of control in the slightest degree; but to box in the driver of a horse or mule car, or of a stagecoach or carriage or wagon, separating him from his animals, while, of course, it could be done, would bring about greater evils than those sought to be remedied. The difference in this respect between cars included in this act and those not included is such as to justify difference in legislating. The claim that the act impairs the obligation of a contract is based on the fact that in each case the railway company had a contract with the city, made before the passage of the act, in which the former bound itself to run cars of 'the best modern style and construction;' and this act requires something in addition thereto. We need only say that, where parties contract on matters within the police power of the state, they do so subject to the exercise of that power whenever the legislature chooses to exercise it. If one contract with the state or a municipal corporation, acting under authority of the state, even if it were conceded that the legislature can, by contract or by giving authority to make a contract, bind the state not to exercise the police power, the legislative intent to do so would have to appear unmistakably. There is nothing to suggest such intent in the charter of either city. What we have said on the third point made by appellants applies with equal force to the fourth. The act imposes a fine of not less than \$50 nor more than \$100 for a violation of the law, and makes each day that cars shall be run without com-

plying with the law a separate offense. A fine of from \$50 to \$100 could not be called excessive. It is true the party may, by repeatedly committing the offense, add up a large aggregate of fines; so might the offender against any other law,—the law against larceny or embezzlement, or any other; but that would not make the punishment excessive."

⁴ *State v. Whitaker* (1901) 160 Mo. 59, 60 S. W. 1068 (act of March 5, 1897). In answer to the contention that the conditions incident to the operation of electric cars are not sufficiently different from those under which other kinds of cars are worked to justify the passage of a law applicable to cars of the former description alone, the court said: "Is it not generally known that on a cable car the gripman stands back near the center of the car, in a box which protects the lower half of his body, and is protected by the roof of the car in rainy or snowy weather, and that this grip car is constantly used by passengers in getting on and off the train, whereas the motorman on an electric car stands in front, with his attention necessarily given to the means of controlling the motive power and the brake, and is much more exposed to the cold and inclement weather of our winters than the gripman on the cable car? And are we to assume the legislature did not consider this difference, or their finding that there was such a distinction was contrary to the fact beyond a reasonable doubt?"

⁵ *State v. Nelson* (1894) 52 Ohio St. 88, 26 L.R.A. 317, 39 N. E. 22.

ward end is provided with a screen for the protection of motormen has, on the authority of the Missouri decision referred to above, been pronounced valid by the court of civil appeals in one of the judicial districts of the state.⁶ In another district, that tribunal has held it to be invalid for two reasons; *viz.*, that being applicable only to corporations, and not to natural persons, joint stock companies, etc., it contravenes the prohibitions of the Federal and state Constitutions against denying the equal protection of the laws; and that it is so uncertain in regard to what constitutes an offense under its provisions,—whether each trip of each car or each day's operation,—that it cannot be enforced.⁷

c. Protection of employees engaged in construction or repair work against inclement weather.—A statute requiring every company or other person who owns, controls, or operates a railroad in the state, to erect at every division point a building for the purpose of sheltering from inclement weather all men permanently employed in the construction and repair (of) cars, trucks, and other railroad equipment, has been held not to be invalid as denying the equal protection of the laws.⁸

2858. Enactments relating to mines.—*a. Generally.*—The Missouri act, which provides that \$10,000 damages may be recovered for the death of a miner killed by the negligence of his employer, the sum recoverable by the general damage act being only \$5,000, has been sustained on the ground that it is a general law, applicable to all persons of a certain class.¹

⁶ *Beaumont Traction Co. v. State* (1907) 46 Tex. Civ. App. 576, 103 S. W. 238 (act of April 3, 1893).

⁷ *Beaumont Traction Co. v. State* (1909) 57 Tex. Civ. App. 605, 122 S. W. 615. The court pointed out the effect of the Missouri act discussed, in the *Whitaker Case*, note 4, *supra*, applied to all "persons, associations, and corporations owning or operating street cars," and continued thus: "It will be seen that the objections here made to the act in question could not have been urged in the Missouri statute, and a reading of the opinion in that case shows that its constitutionality was attacked upon quite other grounds than those here urged. We must conclude, therefore, that the questions here presented were not decided by the court of civil appeals of the fourth district in the case referred to, and that our opinion in no way conflicts therewith."

⁸ The contention rejected was that, at some future time, a commercial corporation or individual not owning or operating any lines of railroad in the state might engage in the business of repairing railroad equipment in the state, and that the act would then fall unequally upon persons similarly situated and engaged in like occupations. The court observed that the legislature, in making a general classification, is not required to provide for "every imaginable and exceptional case." The authority cited for this doctrine was *Ozan Lumber Co. v. Union County Nat. Bank* (1907) 207 U. S. 251, 52 L. ed. 195, 28 Sup. Ct. Rep. 89.

¹ *Fisher v. Central Lead Co.* (1900) 156 Mo. 479, 56 S. W. 1107 (Laws 1891, p. 182, amending Rev. Stat. 1889, § 7074).

b. Enactments applicable only to specific descriptions of mines.—Enactments framed for the purpose of securing the safety of miners are not deemed to be unconstitutional for the mere reason that they relate only to one particular description of mine.²

² In *Re Williams* (1908) 79 Kan. 212, 98 Pac. 777, where a statute covering all coal mines was under review, the court said: "The hazards incident to this work are matters of common knowledge, and proper regulations to secure the safety of employees, so far as possible, is a matter appealing strongly to the wisdom and conscience of the legislature. Regulations to promote this beneficent end are not void because they do not relate to other industries, where, if the peril is as great, the conditions, at least, are different, and may properly call for different regulations."

In *Durkin v. Kingston Coal Co.* (1895) 171 Pa. 193, 29 L.R.A. 808, 50 Am. St. Rep. 801, 33 Atl. 237, the Pennsylvania anthracite coal act was held not to be unconstitutional as a whole, inasmuch as it relates to all anthracite coal mines, and properly and legally defines what shall be regarded as such mines.

In *State v. Barrett* (1908) 172 Ind. 169, 87 N. E. 7, it was held that the legislature has the right to make separate regulations for the mining of bituminous and block coal, though mined in the same field. The court said: "The legislature evidently had in mind that there were greater hazards in operating bituminous than block mines, and it has the power to protect its citizens in their health and safety. It is a very high power, but one justly exercisable, and one which the legislature cannot alienate. *Cleveland, C. C. & I. R. Co. v. Harrington* (1892) 131 Ind. 426, 30 N. E. 37. The legislature had the right, and, we must presume, exercised it, of learning for itself the reasons which impelled it to act, and we cannot say that it did not find substantial reasons for its conclusions. Unless we can say that the act was unreasonable, we would not be authorized to overthrow it, for a very large measure of authority is vested in the legislature upon that subject. . . . To classify legislation by distinctions that naturally inhere in the subject-matter is not to indulge in class legislation. A law is general and uniform if all persons in the same cir-

cumstances are treated alike. The provision with respect to the operation of mines in the various states for the protection of health, life, and limb are extensive and varied, and yet their constitutionality is scarcely questioned. Another familiar example is that of fire escapes and fire appliances upon hotels, theaters, and other buildings, above certain heights, in which people congregate or labor, and in the requirements for guarding machinery. The classification of cities by population for the purpose of different local self-government, though the difference may consist only in a few less than the classification, is upheld. . . . Suppose we had a case where the mining of bituminous coal was carried on many hundreds of feet below the surface instead of less than an average of 100 feet in case of block coal, could it be contended that the greater precaution to protect life, health, and limb could not be imposed on the deep-mine operators, as to light, ventilation, means of escape, and the like, than in case of those of the lesser depth? We think not. That being true, the case before us is one differing only in degree, and not in kind. It is not unlikely that there is in fact a difference in the degree of danger in mining the two kinds of coal. We at least cannot say the contrary. If so, it must be presumed that the legislature informed itself upon that subject. It may be that mining coal at a distance of 165 feet from the surface is more hazardous than mining it at 90 feet. These matters, with the relative output, relative number of mines and persons employed, may have entered into the consideration as requiring the act in one case, and not in the other, and while the relative number of employees, mines, and the output might not be a proper classification if applied to persons in the same class of work, or under the same conditions, we cannot say that they are not different at different depths and in different kinds of coal, and must presume that they are; at least we cannot say that, as applied to all persons alike employed in mining bituminous coal,

c. Enactments not applicable to mines employing less than a certain number of men.—The provision in the Indiana coal mines act to the effect that it “shall apply to all mines except mines employing less than ten men” has been upheld against the objection that is an improper discrimination against mines employing more than ten men.³

See also the first case cited in the next subsection.

d. Inspection.—By the Federal Supreme Court it has been declared that a state legislature is authorized, in the exercise of its police power, to provide for the inspection of coal mines not less than a certain number of times in each year; and, as an incident of its authority in this regard, to provide for the payment of the fees of the inspectors by the mine owners.⁴ The particular objections offered to the validity of the Illinois enactment under review, and which that

the act is invalid because not applicable to block mining, and we cannot say that the act is unreasonable, or determine as to its propriety or impropriety, and to doubt its constitutionality is to resolve in favor of its constitutionality.” The court cited, among other cases, *State v. Marlin* (1897) 137 Mo. 297, 38 S. W. 923, in which classification according to the character of mines and the character of coal mined, and those giving off certain dangerous gases, had been held valid.

³ *Chandler Coal Co. v. Sams* (1908) 170 Ind. 623, 85 N. E. 341 (Laws 1905, chap. 58, Burns’s Anno. Stat. Supp. 1905, chap. 94). The court said: “It was discretionary with the legislature to limit the application of the statute to the larger mines wherein ten or more men are employed, and thereby exempt the small mines, in which but few men are employed, from the regulations and burdens of the statute which are more essentially applicable to mines wherein a large number of men are constantly employed. So far as the legislature was invested with the discretion of limiting the application of the statute to coal mines employing ten or more men, it was the master of its own discretion. The classification contemplated by the legislature embraced mines of a capacity sufficient to employ at all times when in operation the services of ten or more men. . . . The insistence that the statute is, in whole or in part, invalid because the classification is based upon the number of men

employed, and is not applicable alike to small mines where but few men are employed, as well as to the larger mines, is as untenable as it would be to contend that the cities of this state could not, for the purpose of legislation pertaining thereto, be classified according to population; or, in other words, that the laws enacted for the government of the larger cities must also be made to apply alike and without discrimination to the small cities or towns of the state. . . . Not only do the provisions or exceptions in question treat alike all mines under the same existing conditions, but the legislature, in making the classification, has brought within the provisions of the law all coal mines which are operated under the same conditions. Certainly it cannot, with any reason, be asserted that the statute violates § 23 of our Bill of Rights, for it grants no immunities or privileges to one class of persons which, upon the same terms or conditions, do not belong to all.”

⁴ *Consolidated Coal Co. v. Illinois* (1902) 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616, affirming (1900) 186 Ill. 134, 56 L.R.A. 266, 57 N. E. 880, which followed *Chicago, W. & V. Coal Co. v. People* (1899) 181 Ill. 270, 48 L.R.A. 554, 54 N. E. 961 (Acts of July 1, 1895, and July 1897), where the court observed: “Such fee is in no sense a tax, but a mere compensation for services rendered; and the act is therefore not unconstitutional.”

In *Andrius v. Pineville Coal Co.*

court declined to indorse, were, (1) that its purview was restricted to mines in which more than five men were employed at any one time,⁵ and (2) that, in so far as it gave to district mining inspectors a discretion as to the number of times they should inspect the mines, and further discretion as to what fees they should charge, within the limits fixed by it, it was in contravention of the 14th Amendment forbidding a state to deprive any person of life, liberty, or property without due process of law, or to deny any person within its jurisdiction the equal protection of the law.⁶ The supreme court of Illi-

(1906) 121 Ky. 724, 90 S. W. 233, it was laid down, with reference to the Kentucky mining act, that, "where a large number of persons are employed in an extra-hazardous business, it is undoubtedly within the police power of the state to regulate, or to require the employer to regulate, the conditions so as to safeguard the lives and health of the laborers. To that end it is competent, and, indeed, may be necessary, that suitable provision should be made for inspection of the premises and appliances, in order to compel a compliance with the statute, as well as to punish its breaches. One object of such inspection is to ascertain the fact whether the law is being observed and whether its requirements have been complied with."

⁵ With regard to the point thus raised, the court said: "In the case under consideration there is no attempt arbitrarily to select one mine for inspection, but only to assume that mines which are worked upon so small a scale as to require only five operatives would not be likely to need the careful inspection provided for the larger mines, where the workings were carried on upon a larger scale or at a greater depth from the surface, and where a much larger force would be necessary for their successful operation. It is quite evident that a mine which is operated by only five men could scarcely have passed the experimental stage, or that precautions necessary in the operation of coal mines of ordinary magnitude would be required in such cases. There was clearly reasonable foundation for a discrimination here." See also preceding subsection.

⁶ The discretionary power of the inspector was conferred by the clauses of the act which provided that "it shall be the duty of the inspector, as often as he may deem it necessary and proper, and

at least four times a year," to inspect every mine in his district, and that the fees for each inspection shall not be less than six nor more than ten dollars. Discussing these provisions, the court said: "It requires no argument to show that, for the protection of the operatives, one mine may be required to be inspected oftener than another, depending largely upon the number of miners, the depth of their workings, and the nature of the ground through which the excavations are made. While at a certain stage of excavation the precautions imposed by the mining inspector may be quite adequate for the protection of the operatives, at another time the same precautions would be obviously insufficient, depending largely upon the rapidity with which the excavations were made and the changes of air observed as the excavations progressed. . . . We do not regard the act as necessarily violative of the 14th Amendment, in the fact that some discretion is allowed to the inspector in determining the number of times the mines shall be inspected, and the fees fixed therefor, particularly in view of the fact that no complaint is made of the abuse of such discretion, or that the inspector has been 'guilty of any act tending to the injury of miners or operators of mines during their term of office.' Sec. II. c. . . . In enacting a law with regard to the inspection of mines, we see no objection, in case the legislature find it impracticable to classify the mines for the purposes of inspection, to commit that power to a body of experts who are not only experienced in the operation of mines, but are acquainted with the details necessary to be known to make a reasonable classification, although it may affect the amount of fees to be paid by the mine owners. It is obviously nec-

nois rejected the contention that the mandate in its state Constitution (act IV., § 29), which directs the legislature to pass laws for the protection of coal miners by ventilation and escapement shafts, should be construed as prohibiting the enactment of any protective laws except those specified.

Another provision in the Illinois mining act, by which mine examiners are required to mark conspicuously, and to report, dangerous conditions, has been upheld against the objection that, by imposing on operators of mines a duty not resting on other citizens similarly situated, it deprived them of their property without due process of law.⁷

essary that the number of inspections per year shall be determined by someone and by some executive officer. As it is clearly a matter of detail which could not be determined by the courts, it occurs to us that it could be intrusted to no one so safely as to the inspector of the district, who it appointed with great care, and who must be thirty years of age, a citizen of the state, and have a knowledge of mining engineering sufficient to conduct the development of coal mines, and a practical knowledge of the method of conducting the mining for coal in the presence of explosive gases and of the ventilation of coal mines. . . . It appears, then, first, that the state inspector receives a regular salary, neither increased nor diminished by the number of inspections or the amount paid for each inspection; and, second, that he receives such salary directly from the Bureau of Labor Statistics, and not from the fees paid to him therefor. As his compensation is dependent neither upon the number of his visits nor upon the amount of his fees, it is difficult to see how he would gain by multiplying one or magnifying the other. We know of no reason why the legislature should deprive itself of the best attainable evidence of the facts it seeks to make determinative of these two questions."

⁷ *Cook v. Big Muddy-Carterville Min. Co.* (1911) 249 Ill. 41, 94 N. E. 90. The court said: "It is contended that the general assembly can only enact laws affecting particular persons or classes where they possess some common disability, attribute, or qualification, or occupy some position different from others, making them proper objects for

special legislation; and it is said that while there are dangers peculiar to underground mining, such as accumulations of gas and dangerous conditions in the roof, there are numerous other dangerous conditions not peculiar to the occupation of mining coal, but common to other lines of employment. Applied to this particular case, it is contended that the danger of being caught and crushed between the side of a car and an adjoining object is not a danger peculiar to the mining business, but is the same kind of danger to which railroad employees and those engaged in other industries are exposed. . . . The Constitution, by § 29 of article 4, places coal miners in a class by themselves by requiring the general assembly to pass such laws as may be necessary for their protection by providing for ventilation when the same may be required, and the construction of escapement shafts, or such other appliances as may secure safety in all coal mines. The word 'appliances' is very broad and includes anything applied or used as a means to an end, and by the language of the Constitution includes all those things which will secure safety in coal mines. The provision, being intended to secure the safety of those engaged in a perilous occupation, ought not to receive a narrow construction, and we have held that it includes all the physical conditions existing in a mine. *Martens v. Southern Coal & Min. Co.* (1908) 235 Ill. 540, 85 N. E. 743; *Dunham v. Black Diamond Coal Co.* (1909) 239 Ill. 457, 88 N. E. 216. The requirement of the statute for a conspicuous mark and a report relates only to working places and their physical condition, and does not include other

e. Plan of workings.—A statute which enacts that the owner or agent of every coal mine or colliery employing ten men, or more, shall make, or cause to be made, an accurate map or plan of the workings of such coal mine or colliery, etc., and deposit a copy thereof with the inspector of mines, and also with the recorder of the county, has been upheld against the objection that it is not a "police regulation, but simply an arbitrary provision, which had no tendency to protect health or life, and that it compelled landowners to make expensive maps for the mere convenience of their neighbors."⁸

f. Duty of mine bosses to visit miners at intervals.—A statute which provides that miners' bosses shall visit their miners at stated intervals in their working places, and see that they are made secure, and that a sufficient supply of props is always on hand, is not unconstitutional as being class legislation, since it applies to all persons in like circumstances.⁹

g. Ventilation.—By one of the inferior courts of Pennsylvania the coal mine ventilation law of that state has been pronounced constitutional.¹⁰

h. Lighting.—The provision in the Indiana coal mines act to the effect that two lamps shall be lighted at all times when the mine is in operation, "except when electric lights are used," one on each side of the shaft, not more than 10 feet from said shaft, in each vein where men get on and off the cages, has been upheld against the objections that it denies to certain persons the equal protection of the law; (2) that it grants to certain citizens or classes of citizens privileges and immunities which, upon the same terms, do not equally belong to all citizens; (3) that it is not general and uniform in its operation upon all citizens in similar circumstances.¹¹

things, and we regard it as within the authority and requirement of the Constitution."

⁸ *Daniels v. Hilgard* (1875) 77 Ill. 640, 15 Mor. Min. Rep. 280 (Ill. Rev. Stat. 1874, p. 704). The court said: "Our legislature, in an act having for its avowed object the providing for the health and safety of persons employed in coal mines, has thought it proper to incorporate this provision for the making of a map. The lawmaking powers elsewhere, as it is seen in their laws for the same object, have adopted this same provision. This would seem to indicate as the legislative understanding, that the provision is one in aid of the accomplishment of the purpose of such acts,—the protection of persons

engaged in such mines; a proper part of the system adopted to that end. The question is properly one of legislative determination."

⁹ *Davis Coal Co. v. Pollard* (1902) 158 Ind. 607, 92 Am. St. Rep. 319, 62 N. E. 492 (Burns's Rev. Stat. 1901, §§ 7447, 7472).

¹⁰ *Com. ex rel. Williams v. Bonnell* (1871; C. P. Luzerne Co.) 8 Phila. 534, 15 Mor. Min. Rep. 14 (act of March, 1871).

¹¹ In *Chandler Coal Co. v. Sams* (1908) 170 Ind. 623, 85 N. E. 341, discussing the argument that the provisions violate the 14th Amendment of the Constitution of the United States, and also article I, § 23, and article 4, § 23, of

i. Blasting operations.—It has been held that a law requiring that, in all mines where coal is blasted off of the solid, shot firers shall be employed to fire all shots after the employees and other persons have retired from the mine, is not an unreasonable or oppressive exercise of the police power, and is not invalid as depriving the owner of his property without due process of law.¹²

A provision in a mining act to the effect that the sale and delivery of black powder for use in coal mines shall not be made otherwise than in original packages of a specified weight has been upheld against the objection that it discriminates improperly against the industry and the description of powder to which it relates.¹³

j. Signal system.—The clause in Pa. act March 3, 1871, requiring a signal system, cage covering, and brakes, as a provision for the

the state Constitution, the court said: "The contention is that the phrase in § 5575, *supra*, 'except when electric lights are used,' renders it invalid. The argument is advanced that this exception is not based upon any reasonable or just classification, and consequently is an unwarranted discrimination against coal mines in which no electric lights are used. It is asserted that there is no requirement that in any mine in which electric lights are used the two lights mentioned must be kept burning at the bottom of the shaft. Counsel for appellant concede that the danger which the legislature had in view, and intended to prevent by requiring that two lamps should be maintained at the points designated, was that which might be due to the darkness of the mine at such places. The legislature appears to have considered, however, that if the mine was already sufficiently lighted by electric lights, so that the darkness was dispelled at the places in the shaft where the miners get on and off the cages, it would not be necessary, under the circumstances, in addition to the electric lights, to keep two other lamps burning during the time the electric lights were used. . . . It was not the intention of the lawmakers that the mine operator should do a useless thing. The exception in the section in question is manifestly just and legitimate. It merely relieves the mine operator of the burden of keeping the two lamps lighted at such times when the electric lights used in the mine afforded sufficient light for the purpose intended."

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¹² *State v. Murlin* (1897) 137 Mo. 297, 38 S. W. 923 (act of April 11, 1895), following *Com. ex rel. Williams v. Bonnell* (1871) 8 Phila. 536, 15 Mor. Min. Rep. 14. The court said: "If the legislature can regulate the harmless business of the citizen on the ground that possible fraud may be perpetrated, surely there can be no hesitation in holding that a regulation requiring mine owners, who operate mines in which the dangerous agency of blasting powder is used, to so use and handle that powder as to protect the lives and insure the safety of their miners, is a fair and reasonable exercise of the police power, and within the well recognized scope of legislation. One of the great purposes of the people of this commonwealth in establishing a legislative department of our state government was to devise ways and rules to conserve the health and lives of its people. The Constitution lays down certain great and fundamental principles according to which the legislature is to govern, but it commits to the legislature the right and duty of formulating all auxiliary rules to effectuate the principles of the Constitution, and it would be hard to conceive of a more necessary and beneficial exercise of its power than it has shown in prescribing rules for that class of laborers whose duties so constantly expose them to great perils. It is no sense unreasonable or oppressive."

¹³ *Re Williams* (1908) 79 Kan. 212, 98 Pac. 777.

safety of persons employed in coal mines, has been held to be a valid exercise of the police power.¹⁴

k. Medical aid.—The Alabama enactment which requires the operators of coal mines to provide certain surgical appliances and other remedial agencies for the use of employees who may be injured or taken sick in the mines has been declared to be a valid exercise of the police power.¹⁵ On the second appeal of the case cited, the enactment was upheld against the objection that it is improper class legislation.¹⁶

¹⁴ *Com. ex rel. Williams v. Bonnell* (1871) 8 Phila. 534 15 Mor. Min. Rep. 14 (act of March 3, 1871).

¹⁵ *Wolf v. Smith* (1906) 149 Ala. 457, 9 L.R.A.(N.S.) 338, 42 So. 824 (Ala. Code, 1907, § 1019). The court said: "The theory of the demurrant is that the statute is violative of the Constitution, in that it arbitrarily invades the rights of the defendant and deprives him of his property rights without due process of law, and in its enactment that the legislature was not within a legitimate exercise of the police power of the state. It is obviously true that unless the statute falls within the class of police regulations it cannot be upheld, if its effect is to require the mine owner or operator to keep the articles at the mine for the use of employees who may be injured there, without compensation from any source. That would be depriving the defendant of his property without due process of law. 'Private property shall not be taken for private use.' . . . That the law was enacted by the legislature in recognition of the known hazards incident to the business of mining coal, and for the purpose of minimizing such hazards, and of promoting the safety, comfort, and health of those engaged as employees in such business, is discoverable from the subjects dealt with in the act and the treatment of those subjects. To accomplish the purpose in view nothing could be more effectual than the enactment of a law the enforcement of which would secure the proper appointment, the proper construction, and the proper equipment of the mine to be operated. . . . With respect to the particular section of the act involved in this discussion, the legislative power is apparent. It is that the material, ar-

ticles, and emollients should be ready and easily accessible in caring for the class of persons designated, in alleviating their pain and suffering, and probably for the saving of their lives. It may be, we cannot tell, that there might be instances when such articles, ready at the place for use, would be the means of saving the life of the injured. It seems to us that furnishing the material, articles, and emollients required by the statute—§ 2917 of the Code of 1896—should be considered, and was intended by the legislature as a part of the proper equipment of a coal mine, necessary before any person should engage in that business, which, according to common knowledge, is beset with many dangers, and in the prosecution of which accidents are known frequently to occur. In this view it seems that it may be reasonably said that the statutory requirements tend to conserve the comfort and welfare of those who are subjected to the dangers; therefore, that the public welfare and comfort are involved; and that, in the enactment of the statute, the legislature was within the legitimate exercise of the police power."

¹⁶ See *Smith v. Woolf* (1909) 160 Ala. 644, 49 So. 395. After stating the gist of the contentions of counsel, *viz.*, "That coal mine operators are by statute required to furnish as a part of their equipment, articles and appliances not required to be supplied by the operators of other mines conducted under like circumstances,"—the court continued thus: "It will be seen that it is assumed in argument that the dangers attendant upon the working of ore mines, quarries, and railroads are the same as or similar to those incident to coal mining. If we must determine the question at issue

1. *Health of employees.*—The Illinois enactment imposing on the operators of coal mines the duty of providing at the top of each mine, for the use of miners, a washroom so arranged that they may hang their clothes there for the purpose of drying, has been held invalid as special legislation.¹⁷ The opinion was expressed that art. 4, § 29, of the state Constitution, which requires the enactment of “such laws as may be necessary for the protection of operative miners, by providing for ventilation when the same may be required, and the construction of escapement shafts, or such other appliances as may secure safety in all coal mines,” was designed only to procure the passage of laws appropriate to protect miners against personal injury while in the mine.¹⁸

upon the hypothesis that other businesses are attended with similar dangers, then we might answer the insistence of the appellant by saying that, if the court has judicial knowledge in respect to the question, it is that the dangers which menace the employee in the ore mine, in the quarry, or on the railroad, are not the same as those which the employee in the coal mine encounters. We think it may safely be said to be a matter of general information that the operation of coal mines is more hazardous probably than any species of mining. . . . Here it is certainly true that the statute operates on all coal mine operators, and it seems clear to us that they form, by themselves, a proper and legitimate class, with reference to the purposes of the act, and, upon reasonable grounds, that they are distinguishable from ore min operators.” Upon the foregoing considerations, authorities cited, and reasons which underlie the authorities, we conclude that the statute in question is a constitutional enactment, and must therefore be upheld.

¹⁷ *Starne v. People* (1906) 222 Ill. 189, 113 Am. St. Rep. 389, 78 N. E. 61 (Hurd's Rev. Stat. 1903, chap. 93, § 37). The court said: “The only purpose of this act is to promote the health of miners and other persons employed in coal mines. Many men in this state are employed in the foundries and steel mills who work in a higher temperature than do miners, surrounded by conditions deleterious to health and inimical to longevity. The con-

venience provided for by this act is not less desirable to them than to the coal miner. . . . The evil at which this statute is aimed is one that is not visited alone upon persons employed in coal mines. The legislature cannot ameliorate the coal miners' condition under the guise of an exercise of the police power, and leave others unaided who suffer from like causes. Conceding the importance which defendant in error attaches to this act as a sanitary measure, it is apparent that it is not sufficiently comprehensive to remedy the evil at which it is aimed, because it will bring relief only to a part of the people who suffer therefrom.”

¹⁸ Under this head reference was made to *Re Morgan* (1899) 26 Colo. 415, 47 L.R.A. 52, 77 Am. St. Rep. 269, 58 Pac. 1071, where the court considered the scope of art. 16, § 2 of the Colorado Constitution, which provides: “The general assembly shall provide by law for the proper ventilation of mines, the construction of escapement shafts, and such other appliances as may be necessary to protect the health and secure the safety of the workmen therein.” Concerning this provision the court observed: “These regulations manifestly embrace only such reasonably necessary mechanical appliances as will secure the end in view, and do not include other kinds of health regulations.” The Illinois supreme court pointed out that the Colorado Constitution is broader than that of Illinois, since it includes appliances “to protect the health.”

I. ENACTMENTS AFFECTING THE DEFENSES OPEN TO MASTERS IN ACTIONS BROUGHT BY INJURED SERVANTS.

2859. Enactments invalidating contracts which purport to release employers from the liability imposed by the legislature.—The clause of the Ohio employers' liability act 1890, declaring that no railroad company or other person shall demand, accept, require, or enter into any agreement with any person in, or about to enter, the employment of such company, by which such person agrees to waive his right to damages for injury, has been held by a Federal judge to infringe the provisions of the state Constitution which protect the right of acquiring, possessing, and defending property, and provide that all laws of a general nature shall have uniform operation throughout the state.¹ The same position has been taken by two of the inferior courts of Ohio.² But the preponderance of authority is in favor of the doctrine that a provision invalidating any contract which purports to exempt, wholly or partially, a master from the responsibility imposed upon him by a statute that modifies his common-law obligations in respect of the indemnification of the servants for injuries sustained in the course of their employment, is constitutional.³

¹ *Shaver v. Pennsylvania Co.* (1896) 71 Fed. 931, Ricks, D. J., said: "The . . . statute, in denying to the employees of a railroad corporation the right to make their own contracts concerning their own labor, is depriving them of 'liberty,' and of the right to exercise the privileges of manhood, 'without due process of law.' Being directed solely to employees of railroads, it is class legislation of the most vicious character. Laws must not be only uniform in their application throughout the territory over which the legislative jurisdiction extends, but they must apply to all classes of citizens alike. There cannot be one law for railroad employees, another law for employees in factories, and another law for employees on a farm or the highways." The stipulation upheld in that case provided that, if the servant brought suit, the payment of the benefits to which he was entitled as a member of a relief association should cease till the suit was discontinued, or until it was prosecuted to judgment against the railroad company. In *Peirce v. Van Dusen* (1897) 69 L.R.A. 705, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693, the opinion

was expressed that Judge Ricks, although he declared the whole act to invalid, really intended to go no further than to predicate unconstitutionality as regards the first section of the act which includes the clause under review.

² *Cox v. Pittsburgh, C. C. & St. L. R. Co.* (1892) 1 Ohio N. P. 213, 2 Ohio S. & C. P. Dec. 594 (judgment affirmed in (1896) 55 Ohio St. 498, 35 L.R.A. 507, 45 N. E. 641, but question of constitutionality not discussed); *Caldwell v. Baltimore & O. R. Co.* (1904) 14 Ohio S. & C. P. Dec. 375.

³ In *Washington v. Atlantic Coast Line R. Co.* (1911) 136 Ga. 638, 38 L.R.A.(N.S.) 867, 71 S. E. 1066, it was laid down that the clause in the Georgia railroad employer's liability act of 1909 (Civ. Code 1910, § 2785), to the effect that the acceptance of benefits shall not release an employing railroad company from liability, but, in case of recovery, the employer may set off any sum it has contributed to any relief or benefit which may have been paid to the injured employee on account of the injury, is not invalid as abridging the privilege of the railroad company to contract, or depriving it or its relief department of the liberty to contract without due

Some of the enactments under this head explicitly declare that the acceptance of the benefits stipulated by a contract of relief or insurance shall not constitute a defense to an action brought under the given statute. That such a provision is valid, and precludes an employer from relying upon the acceptance of the stipulated benefits as an effective plea in bar of such an action, has been held by the Federal Supreme Court with respect to the Iowa statute. The grounds upon which the constitutionality of the provision under review was unsuccessfully attacked were: (1) That it was an unwarranted interference with liberty to make contracts; and (2) that it denied the equal protection of the laws.⁴

process of law. The court said: "If the benefit agreement should be held to prevent such exercise of the police power of the state from being effective, the power of the state to preserve and protect the safety and welfare of its citizens could be much curtailed by contract. Under such a construction, although a police law might be on its passage and about to take effect, prohibiting a certain thing from being done, parties might enter into an agreement, not making a present settlement, or a contract now fixing liability, but reserving the right to do such thing, or to elect to do it, after the passage of the act, and in spite of its provisions. This would subordinate the police power of the sovereign state to the operation of contracts, not the reverse, as the authorities declare."

In *Mumford v. Chicago, R. I. & P. R. Co.* (1905) 128 Iowa, 685, 104 N. W. 1135, the court said: "Surely a corporation, created by the state and engaged in an extrahazardous business, may be compelled to respond in damages for the negligence of its employees, notwithstanding any contract it may make or attempt to make relieving itself from such responsibility or restricting its liability therefor."

In *Coley v. North Carolina R. Co.* (1901) 129 N. C. 407, 57 L.R.A. 834, 40 S. E. 195, the court observed: "If an express contract could be made to take the place of an implied contract, the essential purposes of the act could be practically defeated at the will of the employer."

In *Shohoney v. Quincy, O. & K. C. R. Co.* (1910) 231 Mo. 131, 132 S. W. 1059, Ann. Cas. 1912 A, 1143, the court said: "The fellow-servant act being

constitutional in its general provisions, it follows that the well-being of the state and public policy imperiously demand that its provisions be held immune from the right of private contract. . . . If the benefits of the new law could be contracted away in a given instance by a stroke of the pen, it would presently not be worth the paper it is written on as a rule of civil action. The words of the statute would be without, life,—mere sound and fury, signifying nothing—mischiefs would abide, the remedy be lost—if we should hold that railroad companies were at liberty to play upon the necessities or ignorance of their employees by exacting releases from liability as an incident to employment."

The validity of these restrictive provisions was also affirmed in *Atlantic Coast Line R. Co. v. Beazley* (1908) 54 Fla. 311, 45 So. 761; *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery* (1898) 152 Ind. 1, 69 L.R.A. 875, 71 Am. St. Rep. 301, 49 N. E. 582; *Pittsburgh, C. C. & St. L. R. Co. v. Hosea* (1898) 152 Ind. 412, 53 N. E. 419; *Opinion of Justices* (1911) 209 Mass. 607, 96 N. E. 308; *Kiley v. Chicago, M. & St. P. R. Co.* (1909) 138 Wis. 215, 119 N. W. 309, 120 N. W. 756.

⁴ *Chicago, B. & Q. R. Co. v. McGuire* (1911) 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259, affirming *McGuire v. Chicago, B. & Q. R. Co.* (1908) 138 Iowa, 664, 116 N. W. 801 (for judgment overruling demurrer, see 131 Iowa, 340, 33 L.R.A.(N.S.) 786, 108 N. W. 902). Discussing the former of these objections, the court, after mentioning that the clause in question had been inserted in the enactment, in consequence of the state court's having decided that

In South Carolina, on the other hand, the doctrine has been adopted, that a provision of this tenor would be invalid, if it were construed as importing that a member of a relief department, after hav-

a stipulation in a contract of membership in the appellant's relief department, to the effect that the acceptance of the specified benefits was to operate as a full discharge, did not fall within the prohibiting of the enactment, in its original form, proceeded thus: "Manifestly the decision that the existing statute was not broad enough to embrace the inhibition did not prevent the legislature from enlarging its scope so that it should be included. Nor was the holding of the court final upon the point of public policy, so far as the power of the legislature is concerned. The legislature, provided it acts within its constitutional authority, is the arbiter of the public policy of the state. While the court, unaided by legislative declaration and applying the principles of the common law, may uphold or condemn contracts in the light of what is conceived to be public policy, its determination as a rule for future action must yield to the legislative will when expressed in accordance with the organic law. If the legislature had the power to incorporate a similar provision in the statute when it was passed originally, it had the same power with regard to future transactions to enact the amendment. . . . It is urged, however, that the amendatory act prohibits the making of a contract for settlement 'by acts done after the liability had become fixed.' The acceptance of benefits is, of course, an act done after the injury, but the legal consequences sought to be attached to that act are derived from the provision in the contract of membership. The stipulation which the statute nullifies is one made in advance of the injury, that the subsequent acceptance of benefits shall constitute full satisfaction of the claim for damages. It is in this aspect that the question arises as to the restriction of liberty of contract." The court then referred to several cases in which the doctrine had been asserted, that "the right to make contracts" is embraced in the conception of liberty guaranteed by the Constitution," and continued thus: "In dealing with the relation of employer and employed, the legislature had necessarily a wide field of discretion in order that

there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. What differences, as to the extent of this power, may exist with respect to particular employments, and how far that which may be authorized as to one department of activity may appear to be arbitrary in another, must be determined as cases are presented for decision. But it is well established that, so far as its regulations are valid, not being arbitrary or unrelated to a proper purpose, the legislature undoubtedly may prevent them from being nullified by prohibiting contracts which modification or waiver would alter or impair the obligation imposed. If the legislature may require the use of safety devices, it may prohibit agreements to dispense with them. If it may restrict employment in mines and smelters to eight hours a day, it may make contracts for longer service unlawful. In such case the interference with the right to contract is incidental to the main object of the regulation, and if the power exists to accomplish the latter, the interference is justified as an aid to its exercise. . . . Here there is no question as to the validity of the regulation or as to the power of the state to impose the liability which the statute prescribes. The statute relates to that phase of the relation of master and servant which is presented by the case of railroad corporations. It defined the liability of such corporations for injuries resulting from negligence and mismanagement in the use and operation of their railways. In the cases within its purview it extended the liability of the common law by abolishing the fellow-servant rule. Having authority to establish this regulation, it is manifest that the legislature was also entitled to insure its efficacy by prohibiting contracts in derogation of its provisions. In the exercise of this power, the legislature was not limited with respect either to the form of the contract, or the nature of the consideration, or the absolute or conditional character of the engagement. It

ing stipulated that if he or his representatives brought suit against his employer, all obligations owed to him by the department should be forfeited, might maintain an action and recover full compensa-

was as competent to prohibit contracts, which on a specified event, or in a given contingency, should operate to relieve the corporation from the statutory liability which would otherwise exist, as it was to deny validity to agreements of absolute waiver. The policy of the amendatory act was the same as that of the original statute. Its provision that contracts of insurance relief, benefit, or indemnity, and the acceptance of such benefits, should not defeat recovery under the statute, was incidental to the regulation it was intended to enforce. Assuming the right of enforcement, the authority to enact this inhibition cannot be denied. If the legislature had the power to prohibit contracts limiting the liability imposed, it certainly could include in the prohibition stipulations of that sort in contracts of insurance relief, benefit, or indemnity, as well as in other agreements. But if the legislature could specifically provide that no contract for insurance relief should limit the liability for damages, upon what ground can it be said that it was beyond the legislative authority to deny that effect to the payment of benefits, or the acceptance of such payment, under the contract? The asserted distinction is sought to be based upon the fact that under the contract of membership the employee has an election after the injury. But this circumstance, however appropriate it may be for legislative consideration, cannot be regarded as defining a limitation of legislative power. The power to prohibit contracts, in any case where it exists, necessarily implies legislative control over the transaction, despite the action of the parties. Whether this control may be exercised in a particular case depends upon the relation of the transaction to the execution of a policy which the state is competent to establish. It does not aid the argument to describe the defense as one of accord and satisfaction. The payment of benefits is the performance of the promise to pay contained in the contract of membership. If the legislature may prohibit the acceptance of the promise as a substitution for the statutory liability, it should also be able to prevent the like

substitution of its performance." With respect to the second objection to the enactment, *viz.*, that it constitutes a denial of the equal protection of the laws, the court said: "It is urged that the prohibition of the amendatory act applies only to those employees of railroad corporations who were embraced within the provision of the original statute, and to the enforcement of the particular liabilities which that statute defined. The limitation to a particular class of employees of railroad corporations is based upon the decisions of the state court that the benefits of the original statute were confined to those who were engaged in the hazardous business of operating railroads. *Deppe v. Chicago, R. I. & P. R. Co.* (1872) 36 Iowa, 52; *Malone v. Burlington, C. R. & N. R. Co.* (1884) 65 Iowa, 417, 54 Am. Rep. 11, 21 N. W. 756; *Akeson v. Chicago B. & Q. R. Co.* (1898) 106 Iowa, 54, 75 N. W. 676. It is said that all employees of the plaintiffs in error may become members of the relief department, and that the limited application of the amendment, as to the effect of the acceptance of benefits under the membership contract, is an invalid discrimination. It was, however, entirely competent for the legislature in enacting the prohibition, for the purpose of securing the enforcement of the liability it had defined, to limit it to those cases in which the liability arose. As the purpose of the amendment was to supplement the original statute, the classification was properly the same. And with respect to subsequent transactions the amendment must be regarded as having the same validity as it would have had if it had formed a part of the earlier enactment. No criticism on the ground of discrimination can successfully be addressed to the amendatory act which would not likewise impeach the statute in its earlier form." The essence of the argument of the state court is contained in the following passages found in the judgment overruling the demurrer: "It may well be said that, if the legislature believe that, by reason of the relations between employer and employee, or by reason of the peculiar circum-

tion, and then also enforce his claims under the relief contract.⁵ But the theory that the meaning of a plain and unambiguous enactment may be thus restricted on the mere ground that, unless it is so restricted, a servant will sometimes be able to secure a larger amount of compensation than that to which he may be entitled under common-law principles, is manifestly unsound.

stances liable to surround the latter when called upon to exercise his option, the practical operation of the relief plan might be to relieve the company from its statutory liability without a corresponding adequate benefit to the employee, then an amendment specifically including the relief contract within the prohibition of the statute would not be an unreasonable stretch of legislative power. . . . Conceding that it is beyond the power of the state to take from the employer the right to discharge his employee, or from the employee the equal right to leave the service of his employer, with or without cause, subject, of course, to any legitimate claim for damages for violation of contract, it is none the less true that the state may still properly provide that no contract into which the employer invites his employee, under the express or implied threat that his refusal will mark him as the first to be discharged from employment, shall be of any avail as a defense to an action for the enforcement of a statutory liability created for his benefit."

⁵ *Sturgiss v. Atlantic Coast Line R. Co.* (1908) 80 S. C. 167, 60 S. E. 939, 61 S. E. 261. The decision of the lower court was affirmed, the members of the supreme court being equally divided. Jones, J., one of the judges who was in favor of the affirmation, reasoned thus: "The statute does not declare that a relief department, such as is shown in this case, is obnoxious to the public health, morals, safety, or welfare. Indeed, it assumes the beneficial character of such an association by requiring the payment of the 'benefits' to those enabled to receive them under the contract. Is plaintiff entitled to recover the benefits under the contract? No, he has expressly stipulated not to be entitled to recover them upon the happening of the conditions existing in this case. His action is upon the contract. Shall he be allowed to enforce the contract in so far as it benefits him, and

repudiate it in so far as it benefits the other party? Surely it would be very unjust to allow this. The statute goes on to provide that the acceptance of benefits shall not estop from recovering damages for negligent injury or death, and declares void any contract to the contrary and any receipt or release given in consideration of the payment of such benefits, but it nowhere declares that a member after full compensation for the negligent injury is still entitled to recover of the same defendant the benefits which he agreed to waive by accepting compensation in such other mode."

This decision was relied on in *Atlantic Coast Line R. Co. v. Dunning* (1908) 94 C. C. A. 128, 166 Fed. 850, 859, 860, as embodying the doctrine accepted by the state courts, and therefore binding in a Federal court. The following extract from the opinion may be quoted: "With respect to the validity of the contract under South Carolina statute, it is to be noticed that it does not forbid making such a contract, but, having been made, the statute in terms requires the employer to pay the employee the amount of benefits to which by the contract the employee is entitled, and then provides that notwithstanding the acceptance of payment the employer shall still continue liable to the employee, if the injury was caused by negligence of the employer, to the same extent as if the employee had not elected to accept and been paid the benefits of the contract. This is different from § 3 of the act of Congress of June 11, 1906, 34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Supp. 1907, p. 891, relating to the liability of interstate carriers to their employees (passed since this suit was instituted), which, while it provides that no contract, such as the one in question, nor the acceptance of benefits under it, shall be a bar to an action of damages against the carrier, provides that the carrier may set off in any such

2860. Enactments excluding the defense of assumption of risks.—

An enactment under which railroad companies are precluded from availing themselves of the defense of an assumption of the risk in question, where the servant has notified his superior of the defective conditions which caused his injury, or where the employer already knows of the defect, has been sustained against the objections that it denies the equal protection of the laws, that it interferes with vested rights, and that it impairs the obligation of contract.¹

2861. Enactments excluding the defense of contributory negligence.—

It seems clear, both as principle and authority, that a legislature does not transcend its powers by declaring either that contributory negligence shall not be a valid defense at all to an action brought by a servant, or that it shall merely serve as a ground for diminishing the amount of damages recoverable.¹

action the amount which it has contributed toward the benefits so paid. This provision would seem to afford an element of fairness and equality which the South Carolina statute lacks, in that it does not require one of the parties to the contract to fulfil his obligations and release the other party."

¹ *Missouri, K. & T. R. Co. v. Bailey* (1909) 53 Tex. Civ. App. 295, 115 S. W. 601. The constitutionality of this enactment was also affirmed in *El Paso & S. W. R. Co. v. Alexander* (1909) — Tex. Civ. App. —, 117 S. W. 927.

¹ In *Missouri P. R. Co. v. Castle* (1912) 224 U. S. 541, 56 L. ed. 875, 32 Sup. Ct. Rep. 606, affirming (1909) 97 C. C. A. 124, 172 Fed. 841, the clause in Neb. Laws 1907, p. 192, chap. 48, § 2, which provides for the application of the rule of comparative negligence in actions by employees against railroad companies for personal injuries, was sustained against the objections that "it deprived 'of the defense of contributory negligence accorded to all other litigants, persons, or corporations within the state of Nebraska,'" and that it "established and enforced against railroads a rule of damages not applicable to any other litigant in similar cases, whereby the privileges and immunities of the company as a citizen of the United States within the jurisdiction of the state of Nebraska were abridged, and it was denied the equal protection of the laws in violation of the 14th Amendment." The follow-

ing remarks of the court of appeals may be quoted: "It is only when, in the opinion of the court, there is no question of negligence or contributory negligence as a matter of fact that cases are taken from the jury, under existing practice. In so far as the statute creates the rule of comparative negligence, it in no wise tends to destroy any of the constitutional rights of defendant. The rule of comparative negligence was adopted by some courts of their own motion, and not until it was demonstrated that the rule is impracticable in cases tried to a jury was it discarded, as in theory it is a just rule and is continually enforced by the courts of admiralty, where the trained minds of judges are able to compare the faults of vessels in collision. It is not a question here, however, whether the rule ought to be adopted, but whether the legislature of Nebraska had the power so to do. Of this we have no question. If the legislature has the power to take away the defense that the injury sued for was committed by fellow servants, it certainly has the right to modify the rule that any negligence of a plaintiff directly contributing to his injury will defeat his recovery."

In *St. Louis, S. F. & T. R. Co. v. Taylor* (1911) — Tex. Civ. App. —, 134 S. W. 819, a similar provision was held not to be invalid as class legislation, in that it exempts from responsibility for contributory negligence only such per-

J. ENACTMENTS PASSED FOR THE BENEFIT OF ORGANIZED LABOR.

2862. Enactments rendering it unlawful to treat membership of a labor union as a ground for refusing employment or dismissing therefrom.—*a. Federal enactment.*—The congressional act which provides that any interstate carrier, or any “officer, agent, or receiver” of such a carrier, “who shall require any employee, or any person seeking employment, as a condition of such employment to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization, or who shall threaten any employee with loss of employment, or shall unjustly discriminate against any employee because of his membership in such a labor corporation,” etc., has been declared invalid, as being an unwarrantable invasion both of personal liberty and of a right of property.¹

For the other points decided in this case, see § 2801, *ante*.

sons as are employees of common carriers by railroad.

In *St. Louis, I. M. & S. R. Co. v. McNamare* (1909) 91 Ark. 515, 122 S. W. 102, it was held that Mo. Laws 1907, p. 181, declaring that the contributory negligence of a person injured through the failure of a railroad company to comply with the provisions of the statute which requires the blocking of switches, etc., shall not relieve the company of liability, is not unconstitutional, as depriving it of its property without due process of law. The statute thus sustained had, after its original enactment, been annulled on a purely technical ground. See *Wells v. Missouri P. R. Co.* (1892) 110 Mo. 286, 15 L.R.A. 847, 19 S. W. 530. Afterwards, without re-enactment, it was carried into the Rev. Stat. of 1899. In *Bran-nock v. St. Louis, M. & S. E. R. Co.* (1906) 200 Mo. 561, 118 Am. St. Rep. 695, 98 S. E. 604, it was held that its inclusion in those statutes did not amount to a re-enactment, and consequently that the defendant's plea of contributory negligence had been improperly struck out. It was then re-enacted in the Laws of 1907.

Compare also *Quackenbush v. Wisconsin & M. R. Co.* (1885) 62 Wis. 411, 22 N. W. 519, where it was held that a statute which excludes the defense of contributory negligence, and imposes an absolute liability on railway companies

for injuries received by any person in consequence of their failure to fence their roads, is not unconstitutional. Such a liability is merely a penalty for failure to conform to a regulation considered by the legislature to be essential for the protection of life and property.

In *Natchez & S. R. Co. v. Crawford* (1911) 99 Miss. 697, 55 So. 59, an action for injuries received by a brakeman while coupling cars, it was held that the validity of the general Mississippi statute, Acts 1910, chap. 135, providing that in all actions for injuries contributory negligence shall not bar a recovery, but the damages shall be diminished, could not be questioned on the ground that it is violative of Const. 1890, § 193, declaring that knowledge by any employee of defective appliances shall not be a defense in an action for injury caused thereby, except as to conductors and engineers in charge of unsafe cars or engines.

¹In *Adair v. United States* (1908) 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764 (act of June 1, 1898, U. S. Comp. Stat. 1901, p. 3205), the court said: “Without stopping to consider what would have been the rights of the railroad company under the 5th Amendment, had it been indicted under the act of Congress, it is sufficient in this case to say that, as agent of the railroad company

b. Illinois.—A statute declaring it unlawful for any person to attempt by discharge, or threats of discharge, to keep the employee from joining or belonging to a labor organization, has been held invalid on the grounds (1) that it improperly interfered with the right of contract, and (2) that it discriminated in favor of members of such organizations.²

and as such responsible for the conduct of the business of one of its departments, it was the defendant Adair's right—and that right inhered in his personal liberty, and was also a right of property—to serve his employer as best he could, so long as he did nothing that was reasonably forbidden by law as injurious to the public interests. It was the right of the defendant to prescribe the terms upon which the services of Coppage would be accepted, and it was the right of Coppage to become or not, as he chose, an employee of the railroad company upon the terms offered to him. Mr. Cooley in his treatise on Torts, p. 278, well says: 'It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with anyone with whom he can make contracts, and if he is wrongfully deprived of this right by others, he is entitled to redress.' . . . While, as already suggested, the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law are subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right . . . to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person

offering to sell it. So, the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. It was the legal right of the defendant Adair—however unwise such a course might have been—to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so—however unwise such a course on his part might have been—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract, which no government can legally justify in a free land. . . . In the absence, . . . of a valid contract between the parties controlling their conduct towards each other and fixing a period of service, it cannot be, we repeat, that an employer is under any legal obligation, against his will, to retain an employee in his personal service any more than an employee can be compelled, against his will, to remain in the personal service of another."

² *Gillespie v. People* (1900) 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007. With regard to the former of these grounds, the court said: "If an owner cannot be deprived of his property without due process of law, he cannot be deprived of any of the essential attributes which belong to the right of property without due process of law. Labor is property. The laborer has the same right to sell his labor, and to contract with reference thereto, as any other property owner. The right of property involves, as one of its essential attributes, the right, not only to contract, but also

c. Kansas.—A statute declaring it to be unlawful to discharge an employee because he belonged to a labor organization, and providing for the recovery of damages for such discharge, has been held to be invalid on the ground that it infringed both the 14th Amendment of the Federal Constitution, and the provision of the State Bill of Rights which guarantees to every citizen life, liberty, and the pursuit of happiness.³

d. Missouri.—An act which prohibited an employer or other person invested with authority over certain classes of employees from

to terminate contracts. . . . Here the employment, as has already been stated, was by the day; and at the end of each day there was no obligation on the part of Gillespie to furnish another day's work, and no obligation on the part of Gibbons to labor for Gillespie. At the time of the alleged offense there was in fact no contract of employment, but at that time Gillespie said, in substance, to Gibbons, I am not employing union men, and, if you belong to the union, you can look elsewhere for employment. This was not a crime on the part of the plaintiff in error, Gillespie. His sole offense consisted in refusing to give employment to a man who belonged to a union labor organization. In other words, he merely exercised his constitutional right of terminating a contract, or refusing to make a contract. Liberty includes, not only the right to labor, but to refuse labor, and consequently the right to contract to labor or for labor, and to terminate such contracts, and to refuse to make such contracts. The legislature cannot prevent persons who are *sui juris* from laboring, or from making such contracts as they may see fit to make relative to their own lawful labor; nor has it any power by penal laws to prevent any person, with or without cause, from refusing to employ another, or to terminate a contract with him, subject only to the liability to respond in a civil action for an unwarranted refusal to do that which has been agreed upon."

³ *Coffeyville Vitriified Brick & Tile Co. v. Perry* (1901) 69 Kan. 297, 66 L.R.A. 185, 76 Pac. 848, 1 Ann. Cas. 936 (Laws, 1897, chap. 120). The court said: "The right to follow any lawful vocation, and to make contracts, is as completely within the protection of the

Constitution as the right to hold property free from unwarranted seizure, or the liberty to go when and where one will. One of the ways of obtaining property is by contract. The right, therefore, to contract cannot be infringed by the legislature without violating the letter and spirit of the Constitution. Every citizen is protected in his right to work where and for whom he will; he may select not only his employer, but also his associates. He is at liberty to refuse to continue to serve one who has in his employ a person, or an association of persons, objectionable to him. In this respect the rights of the employer and the employee are equal. Any act of the legislature that would undertake to impose on an employer the obligation of keeping in his service one whom, for any reason, he should not desire, would be a denial of his constitutional right to make and terminate contracts, and to acquire and hold property. Equally so would be an act the provisions of which should be intended to require one to remain in the service of one whom he should not desire to serve. . . . The business conducted by the defendant was its property, and in the exercise of this ownership it is protected by the Constitution. It could abandon or discontinue its operation at pleasure. It had the right, beyond the possibility of legislative interference, to make any contract with reference thereto not in violation of law. In the operation of its property it may employ such persons as are desirable, and discharge without reason those who are undesirable. It is at liberty to contract for the services of persons in any manner that is satisfactory to both. No legislative restrictions can be imposed upon the lawful exercise of these rights."

contracting with them to withdraw from any trade or labor union or other lawful organization, or to refrain from joining such organization or from attending any lawful meeting or assemblage, and which forbade attempting by any means to compel or coerce any employee into withdrawing from any lawful organization, was annulled on the grounds (1) that it was an unwarrantable interference with the right of contract, and (2) that it was improper class legislation.⁴

That it had none of the attributes of a police regulation was also denied for the reason that it did not, in terms or by implication, promote, or tend to promote, the public health, welfare, comfort, or safety.

e. Nevada.—The enactment by which it is declared to be “unlaw-

⁴ *State v. Julow* (1895) 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781 (act of March 6, 1893, p. 187). Under the first of these heads the court made the following remarks: “The law under review declares that to be a crime which consists alone in the exercise of a constitutional right, to wit, that of terminating a contract, one of the essential attributes of property, indeed property itself, under preceding definitions. Brought to the bar of a court on such a charge, the accused would have been prejudged in so far as the criminality of the act charged is concerned; no question could there be made or admitted as to the quality of the act; that would have been settled by the previous legislative declaration, and it would only remain to find the fact as charged, in order to declare the guilt as charged. But the fact as charged, as already seen, is not a crime, and will not be a crime, so long as constitutional guaranties and constitutional prohibitions are respected and enforced. If an owner, etc., obeys the law on which this prosecution rests, he is thereby deprived of a right and a liberty to contract or terminate a contract as all others may; if he disobeys it, then he is punished for the performance of an act wholly innocent, unless indeed the doing of such act guaranteed by the organic law, the exercise of a right of which the legislature is forbidden to deprive him, can, by that body, be conclusively pronounced criminal. We deny the power of the legislature to do this; to brand as an offense that which the Constitution designates and declares to be

a right, and therefore an innocent act; and consequently we hold that the statute which professes to exert such a power is nothing more nor less than a ‘legislative judgment,’ and an attempt to deprive all who are included within its terms, of a constitutional right without due process of law.” Under the second head the court observed: “Here a nontrade union man, or non-labor union man, could be discharged without ceremony, without let or hindrance, whenever the employer so desired, with or without reason therefor, while in the case of a trade union or labor union man he could not be discharged if such discharge rested on the ground of his being a member of such an organization. In other words, the legislature have undertaken to limit the power of the owner or employer as to his right to contract with, or to terminate a contract with particular persons of a class, and therefore the statute which does this is a special, not a general law, and therefore violative of the Constitution. . . . The legislature may legislate in regard to a class of persons, but they cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes, and enact different rules for the government of each. This would be mere arbitrary classification without any basis of reason on which to rest, and would resemble a classification of men by the color of their hair or other individual peculiarities, something not competent for the legislature to do.”

ful for any person, firm, or corporation to make or enter into any agreement, either oral or in writing, by the terms of which any employee of such person, firm, or corporation, or any person about to enter the employ of such person, firm, or corporation as a condition for continuing or obtaining such employment, shall promise or agree not to become or continue a member of a labor organization, or shall promise or agree to become or continue a member of a labor organization," has been pronounced void as being an improper interference with the right of contract guaranteed by the "due process" clause of the Federal Constitution.⁵

The opinion was expressed that the inclusion in the statute of "an element which is not found in any other similar statute to which attention has been called, in that it prohibits contracts requiring employees to join a union as a condition of employment, in no wise heals its invalidity; the added element simply makes larger and wider the invasion of the liberty of the employer to fix the terms and conditions upon which he will contract for labor."

f. New York.—The "due process" clause of the state and Federal Constitutions was held in the case cited to be violated by an enactment which provided that "any person or persons, employer or employers of labor, and any person or persons of any corporation or corporations, on behalf of such corporation or corporations, who shall hereafter coerce or compel any person or persons, employee or employees, laborer or mechanic, to enter into an agreement, either written or verbal, from such person, persons, employee, laborer, or me-

⁵ In *Goldfield Consol. Mines Co. v. Goldfield Miners' Union* (1908) 159 Fed. 500, Nev. Laws of 1903, p. 207, chap. 111), the court said: "It is a constitutional right of an employer to refuse to have business relations with any person or with any labor organization, and it is immaterial what his reasons are, whether good or bad, well or ill founded, or entirely trivial and whimsical. Under the conditions existing in Goldfield at the time the resolutions were published, it is possible that the only practical method of exercising this right was to require all employees to refrain from being or becoming members of the Western Federation of Miners. Thus we have a right guaranteed by the Constitution, and its exercise blocked, or at least hindered and restricted, by the statute of Nevada. It is too clear to require a citation of authorities that the legislature has no power to restrict the exercise of a constitutional right, unless the interests of the public, as distinguished from the interests of the individual, or of a class of individuals, demand such restraint. The act so forbidden by the legislature must be detrimental to the public welfare, and the health, safety, or morals of the community to justify such interference. There can be no pretense here, and none is made, that the execution of such a contract as the one in question has any tendency to injure the health, safety, or morals of the public, or of either employer or employees. It is clear that the Nevada statute deprives the employer of the right to contract, as to certain matters which may be vital to him, and that it also, while not preventing, does obstruct the exercise of his right to exclude objectionable persons from his employ."

chanic, not to join or become a member of any labor organization, as a condition of such person or persons securing employment, or continuing in the employment of any such person or persons, employer or employers, corporation or corporations, shall be deemed guilty of a misdemeanor.”⁶

g. Ohio.—One of the inferior courts has pronounced invalid an enactment declaring it to be unlawful for any individual, firm, agent, officer, or employee of any company or corporation, to prevent employees from forming, joining, and belonging to any lawful labor organization, and any such individual, etc., that coerces or attempts to coerce employees by discharging them, or threatening to discharge them, because of their connection with such lawful labor organization, is guilty of misdemeanor.⁷ By another such court the same statute has been held to be in conflict with the provisions of the Ohio Constitution which have reference to the protection of property.⁸

h. Wisconsin.—An enactment declaring it to be unlawful “to discharge an employee because he is a member of a labor organization” has been annulled, as being an infringement of the right to “liberty and the pursuit of happiness,” which is guaranteed by the state and

⁶ *People v. Marcus* (1906) 185 N. Y. 257, 7 L.R.A. (N.S.) 282, 113 Am. St. Rep. 902, 77 N. E. 1073, 7 Ann. Cas. 118, affirming (1905) 110 App. Div. 255, 97 N. Y. Supp. 322 (Penal Code, §§ 171–2). The court said: “The free and untrammelled right to contract is a part of the liberty guaranteed to every citizen by the Federal and state Constitutions. Personal liberty is always subject to restraint when its exercise affects the safety, health, or moral and general welfare of the public; but, subject to such restraint, an employer and employee may make and enforce such contract relating to labor as they may agree upon. . . . In *National Protective Asso. v. Cumming* (1902) 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369, it was said that a person may refuse to work for another on any ground that he may regard as sufficient, and the employer has no right to demand a reason for it; but even if the reason is that the employee refuses to work with another who is not a member of his organization, it does not affect his right to stop work, or to refuse to enter upon employment. The converse of this statement must be true, and an employer of labor may refuse to

employ a person who is a member of any labor organization, or he may make an employment conditional upon the person employed refraining from joining or becoming a member of a labor organization. It is a well-known fact that combinations of employees and also of employers require their members to do or refrain from doing many things which they deem to their individual and combined advantage, while a person not a member of such an organization can act in accordance with the terms of such agreement as he may choose to make. A person employing labor may decide that it is to his advantage to employ only union labor, and be willing to enter into an agreement necessary to procure such labor; or he may decide that it is to his advantage to employ nonunion labor, in which case he may also decide that it is to his advantage to make the employment conditional upon an agreement that such employee will not join or become a member of a labor organization.”

⁷ *Davis v. State* (1893) 30 Ohio L. J. 342, 11 Ohio Dec. Reprint, 894 (act of April 14, 1892).

⁸ *State v. Bateman* (1900) 7 Ohio N. P. 487, 10 Ohio S. & C. P. Dec. 68

Federal Constitutions.⁹ The court declined to adopt the view that the desirability of obviating the social disturbances which are fre-

⁹ *State ex rel. Zillmer v. Kreutzberg* (1902) 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098, (Rev. Stat. 1898, § 4466b, as amended by Laws 1899, chap. 332). The court said: "Free will in making private contracts, and even in greater degree in refusing to make them, is one of the most important and sacred of the individual rights intended to be protected. That the present act curtails it directly, seriously, and prejudicially, cannot be doubted. The success in life of the employer depends on the efficiency, fidelity, and loyalty of his employees. Without enlarging upon or debating the relative advantages or disadvantages of the labor union, either to its members or to the community at large, it is axiomatic that an employer cannot have undivided fidelity, loyalty, and devotion to his interests from an employee who has given to an association right to control his conduct. He may, by its decisions, be required to limit the amount of his daily product. He may be restrained from teaching his art to others. He may be forbidden to work in association with other men whose service the employer desires. He may not be at liberty to work with such machines or upon such materials or products as the employer deems essential to his success. In all these respects he may be disabled from the full degree of usefulness attributable to the same abilities in another who had not yielded up to an association any right to restrain his freedom of will and exertion in his employer's behalf according to the latter's wishes. Such considerations an employer has a right to deem valid reasons for preferring not to jeopardize his success by employing members of organizations. A man who has, by agreement or otherwise, shackled any of his faculties—even his freedom of will—may well be considered less useful or less desirable by some employers than if free and untrammelled. Whether the workman can find in his membership in such organizations advantages and compensations to offset his lessened desirability in the industrial market is a question each must decide for himself. His right to freedom in so doing is of the same grade and sacredness as that of the employer to consent or refuse to

employ him according to the decision he makes. We must not forget that our government is founded on the idea of equality of all individuals before the law. Such restraints as may be placed on one may be placed on another. If the liberty of the employer to contract or refuse to contract may be denied, so may that of the employee. In answering the question now before us, we may not forget the possibility of being called on to answer whether the legislature may make a criminal of the employee who quits, for example, because his employer joins a blacklisting association; because nonunion men or members of some other union are employed, or nonunion or forbidden machines or materials are used; because of an obnoxious foreman; because excessive hours of work are required; because compelled to trade at employer's store or board at his boarding house; or because of any other fact or conduct now considered entirely adequate reason for refusing or leaving a particular service. . . . Is it within the legislative power to make criminal the refusal to contract with another for his labor for any reason which the employer deems cogent? We speak of refusal to contract, for, while the act mentions only discharge, it is in no wise limited to situations where there is any contract or other right to continuance of employment, and is obviously intended by the framers to apply generally to the relation of employer and employee, where, as common knowledge assures us, there is usually no term of employment and each day constitutes a new contract. As each morning comes, the employee is free to decide not to work, the employer to decide not to receive him, but for this statute. That the act in question invades the liberty of the employer in an extreme degree, and in a respect entitled to be held sacred, except for the most cogent and urgent countervailing considerations, we have pointed out. Hardly any of the personal civil rights is higher than that of free will in forming and continuing the relation of master and servant. If that may be denied by law, the result is legalized thralldom, not liberty,—certainly not to the laboring men of the country. This aspect of the subject is too clear to warrant fur-

quently incidental to disputes between employers and trade unions is a circumstance that justifies a court in treating such an enactment as a permissible exercise of the police power.¹⁰

2863. Enactments providing that only members of labor unions shall be employed on public work.—In an Illinois case, where the actual point decided was that a provision in a contract for a public-school building, which required the employment of union men, was invalid because it created a monopoly in their favor and restricted competition by preventing contractors from employing any but union men, the court declared it to be “unquestionable that if the legislature should enact a statute containing the same provision as this contract in regard to any work to be done for boards of education, or if they should by a statute undertake to require this board, as the agency of the state in the management of school affairs, . . . to adopt

ther discussion. Is there any conceivable reason to warrant such extreme invasion of individual liberty? Can it be necessary to the reasonable liberty of others under the law? The act here charged as criminal clearly does not deprive any other person of any private or civil right. Its utmost effect is to deny privilege of contract, but no right exists to enter into contract with another against his will. The maxim, *Sic utere tuo ut non alienum lædas*, cannot justify restraint of acts which do not injure others in their legal rights. We therefore find entirely lacking one of the requisites of the police power to restrain conduct, declared by many authorities to be an essential, namely, that such conduct shall injuriously affect the rights of others. . . . But though not directly injurious to the rights of other individuals, is the forbidden act injurious to the welfare of the community? Is its prohibition so essential to the existence of good government that we must assume the Constitution builders intended the liberty which they reserved should be subject to it? Or does it so tend to promotion of public peace or safety that we can reasonably attribute to the legislation such a purpose? After most careful consideration, we find ourselves unable to reach an affirmative answer to any of these queries. We have sought to give to the legislature the benefit of every doubt.”

¹⁰In this connection it was remarked: “One menace to public welfare was suggested by counsel for plaintiff

in error, based upon the assertion that discharges of employees, especially union men, are likely to be followed by turbulence, violence, and even blood shed; hence that it was proper to deprive employers of their rights, presumably because they are ordinarily law-abiding and will not make trouble. We decline to acknowledge as a fact that the laboring men, as a class, union or nonunion, are more prone to law-breaking or violence than other classes of the community, or to adopt the theory that the legislature so assumed. But even if that assumption were made, it would constitute no justification for depriving one man of his liberty of contract, that another was likely to commit crimes or breaches of the peace. As well deny the right of private ownership of chattels because they tempt the thief to steal. Neither the restriction imposed nor the penalty is at all relevant to the public purpose sought, nor to the wrongful acts threatened. . . . We hold that freedom to make, and even more to refuse to make, contracts whereby no rights of others suffer, cannot be restricted, unless otherwise will result substantial disturbance of the public health, safety, or welfare, and that even a possible tendency of some persons to wrongfully disturb the peace when thwarted of their will constitutes no justification for restraining others of their just rights; nor, if so, is the present act at all calculated or reasonably necessary to prevent the only suggested menace to the community.”

such a rule or insert such a clause in its contracts, or should undertake to authorize it to do so, the provision would be absolutely null and void as in conflict with the Constitution of the state."¹ But the doctrine embodied in this statement seems to be essentially inconsistent with the general theory propounded in a more recent case by the Federal Supreme Court with regard to the complete authority which a legislature possesses in respect of regulating the details of municipal administration.² It follows, therefore, that unless there is some adequate reason for excepting statutes of the type now under review from the operation of that theory, the view put forward in the *obiter dictum* quoted above can no longer be deemed correct. The present writer confesses his inability to perceive upon what ground such an exception could be justified.

The correctness of two decisions by which the Illinois court has annulled municipal ordinances designed to benefit labor unions is also somewhat questionable. By one of them an ordinance which required that persons contracting for the performance of public works should agree to hire only members of labor unions was pronounced invalid, on the ground (1) that it amounted to a discrimination between different classes of citizens, (2) that it infringed the freedom of contract, and (3) that it laid down a rule which restricted competition and increased the cost of work.³ Having regard to the consideration that a municipality is entitled to administer its business affairs according to its own conception of what is expedient, it is difficult to admit the conclusiveness of the reasons thus assigned for the decision. It is submitted that the legality of what is essentially a mere statement of the conditions upon which a municipality is willing to have work performed for it by persons other than its own servants cannot properly be gauged with reference to the same criterion as those which determine the validity of a statute.

In another case it was held that an ordinance requiring all contracts for city printing to be awarded to union shops only, or to such as are able to show the union label, was held to be illegal, as tending to create monopoly and impose an additional burden on taxpayers, who are entitled, under ¶ 94 of § 1 of article 5 of the Illinois city and village act (Rev. Stat. 1874, p. 223), to have such contract let

¹ *Adams v. Brennan* (1898) 177 Ill. 194, 42 L.R.A. 718, 69 Am. St. Rep. 222, 52 N. E. 314. the validity of a law limiting the hours of labor on public work. See § 2829, c. ante.

² *Atkin v. State* (1903) 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124, where the actual question involved was ³ *Fiske v. People* (1900) 188 Ill. 206, 52 L.R.A. 291, 58 N. E. 985.

to the lowest bidder.⁴ But a provision of this tenor seems to be merely a formal direction as to the procedure to be followed in relation to bids actually submitted. The desirability of securing a perfectly free competition in tender for public work is patent. But this object ought to be attained by a specific enactment expressed in appropriate language, and not by straining the sense of one which, on its face, is intended for a different purpose.

2864. Enactments excepting trade unions from the purview of anti-trust laws.—*a. California.*—It has been held that, if the enactment in question, which provides that no combination to procure any act to be done in furtherance of any trade dispute between employers and employees shall be restrained, etc., were to be construed as forbidding a court to restrain a labor union from illegally interfering with the business of a former employer of the members, it would be void (1) as being “violative of plaintiff’s constitutional right to acquire, possess, enjoy, and protect property,”¹ and (2) as “creating arbitrarily and without reason a class above and beyond the law which is applicable to all other individuals and classes.”²

b. Illinois.—clause amending a statute by which combinations formed for the purpose of raising or maintaining wages were exempted from the penalties imposed upon persons forming pools, trusts, and combinations, was held to be an unlawful discrimination in favor of the class of persons to which the clause was applicable.³

⁴ *Holden v. Alton* (1899) 179 Ill. 318, 53 N. E. 556. The court said: “There is here an unequivocal admission of an arbitrary exclusion from the privilege of contracting with the city or laboring for it, of a portion of the citizens, for the sole reason that they are not members of an association, and this action increases the cost of the printing to the injury of the taxpayer. It is immaterial whether there was any attempted ordinance as a basis for such action, or whether it had been approved. The statute and the ordinance required the contract to be let to the lowest bidder, and this implied equal opportunity and freedom in all who might choose to bid.”

¹ *Goldberg, B. & Co. v. Stablemen’s Union* (1906) 149 Cal. 429, 8 L.R.A. (N.S.) 460, 117 Am. St. Rep. 145, 86 Pac. 806, 9 Ann. Cas. 1219, and the case cited in the next note (construing Laws 1903, chap. 235).

² *Pierce v. Stablemen’s Union* (1909) 156 Cal. 70, 103 Pac. 324. The court said:

“It would legalize a combination in restraint of trade or commerce, entered into by a trades union, which would be illegal if entered into by any other persons or associations. It would exempt trades unions from the operation of the general laws of the land, under circumstances where the same laws would operate against all other individuals, combinations, or associations. It is thus not only special legislation, obnoxious to the Constitution (art. 4, § 25, subdvs. 3, 33), but it still further violates the Constitution in attempting to grant privileges and immunities to certain citizens, or classes of citizens, which, upon the same terms, have not been granted to all citizens. Art. 1, § 21.”

³ *People ex rel. Akin v. Butler Street Foundry & Iron Co.* (1903) 201 Ill. 236, 66 N. E. 349 (act of 1891, § 2, as amended by act of 1893 [Hurd’s Rev. Stat. 1899, pp. 616, 617]).

c. Nebraska.—A statute which prohibits the formation of trusts, but authorizes “assemblies or associations of laboring men to pass laws and adopt such regulations as they may think proper, in reference to wages and the compensation of labor,” has been held by a Federal court to be invalid, as denying the equal protection of the laws to persons who do not belong to such organizations.⁴ The supreme court of the state, on the other hand, has sustained this statute against the objection that it contravenes the clause of the state Constitution which forbids the granting of special and exclusive privileges or immunities.⁵ But if the decision of the Federal court is correct, the fact that the statute is not within the prohibition of that clause is manifestly ineffectual to save it from condemnation.⁶

d. Missouri.—The enactment which provides that any person who shall become a party to any “pool, trust, agreement, combination,

⁴ *Niagara F. Ins. Co. v. Cornell* (1901) 110 Fed. 816 (Laws 1897, chap. 79).

⁵ *Cleveland v. Anderson* (1900) 66 Neb. 252, 5 L.R.A. (N.S.) 136, 92 N. W. 306. The court said: “If laborers are clearly within the general scope and reason of the act, so that the provisions exempting them from its operation arbitrarily permits them to do acts in contravention of its terms and purposes which are forbidden to the public at large, there can be no doubt the statute must fail. . . . On the other hand, if the legislature has made a reasonable classification,—not a mere cloak or cover for an arbitrary exemption of certain persons or a certain class of persons, but a natural and proper selection of those who, upon a reasonable view of the mischiefs to be met, should be subject to the regulations prescribed,—and the law is made to operate generally and uniformly upon all the class so constituted, the constitutional provision in question is not violated. . . . The question to be determined is whether the exception . . . is arbitrary and without sound reason, arising from the situation and circumstances of the subject of the legislation, . . . or based upon a reasonable view of the subject-matter, and the different conditions it presents. . . . Applying these principles . . . we think the statute is constitutional and valid. In its letter and spirit, it refers only to combinations and conspiracies of persons engaged in the manufacture, sale, and transporta-

tion of goods, wares, and merchandise, to prevent or hinder competition, and regulate and control prices. No express exception of organizations of laborers, intended to maintain or advance wages, was necessary to exempt them from its operation. The section in question is inserted rather out of abundance of caution, to prevent judicial extension of the terms of the act beyond its scope and purpose, than to grant a privilege or immunity to persons who would otherwise fall within its terms. The distinction between goods and merchandise produced by skill and labor, and the skill and labor which produce them, is manifest and reasonable. The statute does not say that laborers who have goods, wares, or merchandise, the product of labor, for sale, may combine to advance or control the price, but only that the law designed to prevent combinations in restraint of trade in such articles, when produced, shall not be construed to affect organizations formed to regulate the wages or compensation of the labor and skill which produce them. . . . Labor and skill are not articles of commerce,—at least, not in the same sense as the articles thereby produced; and we think the classification which distinguishes between them, and provides for a diversity of legislation with respect to them, is reasonable and proper.”

⁶ In the opinion of the state court no reference was made to the Federal decision, which had been rendered in the preceding year.

confederation, or understanding" to regulate or fix the price of any article of manufacture, merchandise, commodity, etc., or to maintain said price when so regulated or fixed, or to fix or limit the amount or quantity of any article of manufacture, merchandise, commodity, etc., shall be deemed guilty of a conspiracy to defraud, has been sustained against the objection that it is repugnant to the 14th Amendment of the Federal Constitution in two particulars, viz. (1) "that while it denounces the same acts, whether committed by individuals or individuals and corporations, it imposes upon the latter a greater and different punishment from that imposed upon individuals; and (2) that it unjustly discriminates against property by embracing commodities only, and not including labor." ⁷

⁷ *State ex inf. Hadley v. Standard Oil Co.* (1909) 218 Mo. 1, 116 S. W. 902. Discussing the former objection, the court said: "In answer to that, it may be said that an individual is a natural person, created by his Maker, and not by law, and therefore has no franchises to exercise or to forfeit; consequently the same punishment, if you so term it, could not, in the very nature of things, be measured out to the individual which should be measured unto a corporation. While it is true, to forfeit the charter of a corporation for usurpation of power is equivalent to taking its life, as it were; but we suppose it will not be seriously argued that, because the statute does not demand the life of the individual, as it does that of the corporation, as a punishment for his violation of the law, the law should and must be declared unconstitutional and void upon that ground. And, upon the other hand, where a statute denounces certain acts, whether committed by individuals or corporations, or both, it should not be declared unconstitutional because it provides for imprisonment of the former and a fine, or forfeiture of the latter's charter, as punishment for their violation of the statute. But if the contention of counsel for respondents is sound, then any individual could form an unlawful combination in restraint of trade with any corporation, and when proceeded against for such unlawful conduct, either one or both of them could interpose the unconstitutionality of the statute, because the punishment prescribed against each is not the same, but different. And we might add that,

if their position is tenable, then the legislature would be powerless to provide for the imprisonment of the one because it could not imprison the other; nor could it provide for the forfeiture of the charter of the corporation, because the individual would have none to forfeit; *ergo* there is no punishment the legislature could provide, excepting a fine against each. Such a contention regarding the proposition here involved, if followed to its logical conclusion, would lead to an absurdity, and, at the same time, shows the unsoundness of respondents' contention." The second objection was thus disposed of: "While it is true those statutes are limited in their scope and operation to persons and corporations dealing in commodities, and do not include combinations of persons engaged in labor pursuits, yet it must be borne in mind that the differentiation between labor and property is so great that they do not belong to the same general or natural classification of rights or things, and have never been so recognized by the common law, or by legislative enactments. They stand upon entirely different footings, and the laws pertaining to the one are entirely different from those pertaining to the other. Labor has always been considered in the nature of an attribute to man, and partakes more or less of his individuality and personal liberty, and is inseparable from his person. Labor and labor organizations are controlled and protected by laws enacted to operate largely upon the individuals personally, and not so much as upon the products of their labor, called com-

e. Texas.—A statute which empowers persons engaged in labor to form trade unions, and declares that its provisions shall not apply to combinations of capital formed to limit the production or consumption of commodities, or in restraint of trade, etc., has been held not to engraft such exemptions on the general anti-trust law as would render it unconstitutional. The second statute was construed as showing that it was not the intention of the legislature to authorize anything to be done which was forbidden by the first one.⁸

2865. Enactments denying the use of public employment offices to employers whose employees are on strike or locked out.—An Illinois act which created free employment offices, as a means of assisting persons in search of employment and employers needing assistance, and which provided in one of its clauses that the superintendent of an office should in no case furnish employees or a list of employees to an applicant whose employees were on strike or locked out, has been pronounced invalid.¹ The *ratio decidendi* was that this clause interfered with the freedom of contract, and discriminated between two classes of employers; and, as a result of that discrimination, also affected persons who might desire to obtain work from the class of employers specified.² It was also held that

modities: while, upon the other hand, commodities are nothing but property, and have no personal connection with the owner whatever. Legislation affecting property and property rights will in no manner interfere with the personnel of the owner. But that is not true of laws regarding labor, for the reason that the moment you enact laws affecting labor, that moment and by that law you affect the personnel of the laborer."

⁸ *Waters-Pierce Oil Co. v. State* (1908) 48 Tex. Civ. App. 162, 106 S. W. 918 (construing the act of May 27, 1899, and May 25, 1899).

¹ *Mathews v. People* (1903) 202 Ill. 389, 67 N. E. 28 (act of April 11, 1899), overruling *Price v. People* (1901) 193 Ill. 114, 55 L.R.A. 588, 86 Am. St. Rep. 306, 61 N. E. 844, to the extent stated in § 2876, *post*.

² The court said: "There is no rational basis in law or justice for this distinction, where the language is so broad as to include as well those who have caused the strike or lockout for good reasons, as those who have caused such strike or lockout without any good reason. The prohibition contained in § 8 not only affects the class of employers

there named, but it also affects the persons seeking employment with whom such employers might otherwise come in contact. That is to say, not only the employers whose men are on a strike or are locked out are affected by the prohibition, but laborers or employers who might desire to fill the places of the employees who are on a strike or are locked out are also affected by it. The applicants for employment are deprived of the privilege of working for the class of employers named in § 8. That section, therefore, strikes at the interests of applicants for work and of employers seeking work or labor. An employer whose workmen have left him and gone upon a strike, particularly when they have done so without any justifiable cause, is entitled to contract with other laborers or workmen to fill the places of those who have left him. Any workman seeking work has a right to make a contract with such an employer to work for him in the place of any one of the men who have left him to go out upon a strike. Therefore, the prohibition, contained in § 8 strikes at the right of contract, both on the part of the laborer and of the employer. It is now well

the exceptive clause could not be eliminated without producing results not contemplated by the legislature, and that consequently the entire act must be avoided.

2866. Enactments relating to union labels.—Enactments intended for the protection of union labels have been attacked in several cases, but without success, on the ground that they infringe the provisions of state Constitutions which forbid the legislature to grant special rights or privileges to corporations, associations, or individuals.¹

settled that the privilege of contracting is both a liberty and a property right. Liberty includes the right to make and enforce contracts, because the right to make and enforce contracts is included in the right to acquire property. Labor is property. . . . Section 8 draws an unwarrantable distinction between workmen who apply for situations to employers where there is no strike or lockout, and workmen who do not so apply, and it also draws an unwarrantable distinction between employers who may have the misfortune to be victims of a strike or lockout and employers who do not have such misfortune; that is to say, § 8 does not relate to persons and things as a class, or to all employers, but only to those who have not been the victims of strikes or lockouts. 'Where a statute does this,—where it does not relate to persons or things as a class, but to particular persons or things of a class,—it is a special, as distinguished from a general, law.'

¹ In *Cohn v. People* (1894) 149 Ill. 486, 23 L.R.A. 821, 41 Am. St. Rep. 304, 37 N. E. 60, it was argued that under the statute in question (act of 1891) while "persons" were protected in their labels, etc., without regard to their avocations; "associations or unions, to avail themselves of the act, must be associations or unions of workingmen." But the court said that this contention was based upon a misapprehension of the statute, and that it was clear that the legislature intended that any person, or any association of whomsoever formed, or any union of workingmen, might adopt such label, etc.

In *People v. Dantuma* (1911) 252 Ill. 561, 39 L.R.A.(N.S.) 1190, 96 N. E. 1087, Ann. Cas. 1912 D, 370, the validity of the same statute was again affirmed.

In *State v. Bishop* (1895) 128 Mo. 373, 29 L.R.A. 200, 49 Am. St. Rep. 569,

31 S. W. 9, the court remarked: "It is well settled law, in this state at least, that a statute relating to persons or things as a class is a general law. *State ex rel. Harris v. Herrmann* (1882) 75 Mo. 340; *State ex rel. Lionberger v. Tolle* (1880) 71 Mo. 645; *Lynch v. Murphy* (1893) 119 Mo. 163, 24 S. W. 774. The law [act of 1893] does not relate to particular persons or things of a class, but embraces within its provisions all associations or unions or workingmen, and clearly does not fall within the inhibition of the Constitution."

In *Schmalz v. Wooley* (1898) 57 N. J. Eq. 303, 43 L.R.A. 86, 73 Am. St. Rep. 637, 41 Atl. 939, reversing (1898) 56 N. J. Eq. 649, 39 Atl. 539, the statute under review (act of 1889) was sustained against the objection that, "as the privileges of this act are confined to associations or unions of workingmen for the protection of goods manufactured by their members, and are not offered to other workingmen who may not choose to form associations or unions, or to persons generally, the privileges are therefore exclusive and the act is special." The court said: "All the legislation of the state respecting societies, associations, and corporations is based upon the idea that privileges which are denied to single individuals may be conferred upon groups of persons, and nothing in the Constitution was intended to subvert this doctrine. If the legislature offers to any class of persons privileges peculiarly appropriate to their class, on condition that several of them shall unite for the purpose of accepting and exercising them, the Constitution will not thereby be infringed. The privileges of this act are offered to all workingmen engaged in the manufacture of goods who thus unite, and they relate to goods of every description manufactured by them. Certainly workingmen engaged in the manufac-

But a provision which purported to empower the party injured by a violation of the statute to fix, within the limits prescribed, the

ture of goods constitute a distinct class of persons, and there is a manifest appropriateness in enabling any of them who comply with the act to provide and protect a mark distinguishing the products of their labor and skill. Nor is it at all necessary that a similar privilege should be given to those who are not workmen, but are only employers of workmen. Such persons stand in a different class with respect to the exercise of those faculties which the legislature intended to foster."

In *Perkins v. Heert* (1899) 158 N. Y. 306, 43 L.R.A. 858, 70 Am. St. Rep. 483, 53 N. E. 18, the court thus dealt with the contention that the act of 1889 for the better protection of skilled labor, and for the registration of labels, marks, names, brands, or devices covering the products of such labor of associations or unions of workmen or women, contravenes the provision of the Constitution which prohibits the passage of a private or local bill granting "any exclusive privilege, immunity, or franchise was thus dealt with." "There is nothing in the title or the provisions of the act that in any manner limits its provisions to any particular locality of the state, or to any designated association or union of workmen or women. Instead, the provisions are all general, including every locality in the entire state, and embracing every association or union of workmen or women existing or that may be thereafter organized. It is in no sense local or private, but it is in every sense a general law. . . . It is insisted that the act is unconstitutional and void, for the reason that it is contrary to public policy, in that it unjustly discriminates in favor of the labor of members of associations or unions as against that of nonunion workmen. The questions arising under this contention are more serious and require deliberate consideration. While private and local bills, granting to a private corporation, association, or individual any exclusive privilege, immunity, or franchise whatever, are prohibited, the Constitution authorizes the legislature to pass general laws under which grants may be made to corporations, associations, or individuals of an exclusive

privilege, immunity, or franchise. An exclusive privilege or franchise is, therefore, authorized if obtained under general laws. . . . The Constitution is the foundation upon which the public policy of the state is based. It embodies the policy of our government. It authorizes that which is politic, and prohibits that which is deemed impolitic. Where, therefore, the Constitution grants or authorizes a grant through legislative action of an exclusive privilege, it must be deemed to be in accord with the policy of the state. As we have seen, the label authorized was by a general, and not a local, act. No particular association or union has been given the exclusive privilege of adopting a label, but every association or union of every kind of workmen or women is given the right to adopt its own label, which may indicate its own workmanship. It consequently follows that whatever discrimination there may be is authorized, and therefore not unjust, and that the privilege granted under the general law is in accord with public policy. . . . We have not overlooked the intimation that the passage of this act was procured for the purpose of enabling union labor organizations to boycott nonunion laborers, and to deprive them of the legitimate fruits of their labors. We cannot, however, assume that such was the purpose and intent of the legislature, or that the association of which the plaintiff is president will resort to acts which are unlawful and criminal. The act allows the members of the union to send the products of their labors into the markets of the country, marked in such a way as to indicate the character of their workmanship. This is legitimate and proper. It is a right that the law accords to every manufacturer. We must assume, therefore, that the legislature, in passing the act, had in view the lawful and legitimate purpose, and that they did not contemplate that the provisions of the act might be used for illegitimate purposes."

In *Com. v. Norton* (1901) 16 Pa. Super. Ct. 423, it was laid down that the provision of the act of May 21, 1895, making it a misdemeanor to counterfeited labels of workmen's unions,

amount of the penalty which, in addition to full compensation for the injury suffered, shall be exacted from the offender for the use and benefit of the injured party, has been pronounced invalid, on the ground that such a proceeding deprives the offender of his property without due process of law.²

is a proper exercise of the police power, and that a statute declaring such an act to be a public wrong and indictable offense cannot be pronounced unconstitutional because it does not include every trademark or label which individuals or associations may adopt. The point raised by the argument of counsel with reference to the constitutional prohibition against the passage of local or special laws granting special or exclusive privileges, *viz.*, "that the privilege created by the act is conferred only on union workmen, and that this is a basis of classification which results in special legislation, conferring special privilege on particular individuals or associations," was regarded as being beyond the scope of the inquiry. The court said: "The defendant knew or should have known that by counterfeiting he was guilty of wrongdoing. For this act the legislature has said that he shall be punished as for the commission of a misdemeanor. It is clear that the police power of the state extends to provision for the punishment of cases of moral wrong, and that with the legislature rests the determination of the question whether the particular wrongful act shall be punished or not. The question which we are called upon to decide is not whether the legislature has offended the constitutional inhibition in an enactment which, in its operation, is alleged to result (indirectly and consequentially) in conferring a special privilege upon a special class. So far as the case before us is concerned, we are determining only that the legislature has the right to impose a penalty upon the commission of an act of turpitude."

² *Cigarmakers' International Union v. Goldberg* (1905) 72 N. J. L. 214, 70 L.R.A. 156, 111 Am. St. Rep. 662, 61 Atl. 457. After referring to the decisions which have established the doctrine "that the legislature is not prohibited from enacting that the penalties imposed for public offenses, which work special injury to individuals, shall be

recovered for the benefit of those individuals, although they exceed compensation for the injury sustained," the court said: "But an examination of the cases discloses that inasmuch as the penalty, when not required to compensate the injured party, must necessarily proceed on public considerations, the amount of the penalty is always ascertained by some public agency. Thus, in the case of exemplary damages and under many penal statutes and ordinances, a judicial tribunal fixes the amount. In other statutes the legislative body prescribes either the absolute sum or a standard for ascertaining the sum proportioned to the wrong done. But in the case now before us, none of these just limitations is observed. The legislature has attempted to devolve upon the private party the duty or power of weighing the public considerations on which the penalty should be measured. . . . Such a course seems to us unconstitutional. The fixing of the precise legal penalty to be imposed must be essentially either a legislative function, in which only general considerations can have weight, or a judicial function, in which general considerations may be modified by special circumstances. As a legislative function the power has been partly exercised in the statute, which, under constitutional regulation, must precede the commission of offenses. There remained, to complete the object of government, only the judicial function. The power to discharge that function could not be conferred upon any body without making provision for a hearing of the party concerned before the penalty to be borne by him was determined, and even with that provision it could not be conferred upon the party for whose benefit the penalty was to be exacted. Manifestly it was not delegated by the present enactment. A man cannot be regarded as discharging a judicial function when he reaches a determination in his own interest without hearing his adversary."

K. MISCELLANEOUS ENACTMENTS.

2867. Enactments relating to the character of servants.—a. Certificate of cause of discharge.—The Georgia statute which imposed upon railroad, express, and telegraph companies the duty of giving “to their discharged employees or agents the causes of their discharge when discharged,” was pronounced unconstitutional on the grounds (1) that “the public, whether as many or one, whether as a multitude or a sovereignty, has no interest to be protected or promoted by a correspondence between discharged agents or employees and their late employers, designed, not for public, but for private, information as to the reasons for discharges and as to the import and authorship of all complaints or communications which produced or suggested them;” and (2) that such a requirement “is violative of the general private right of silence enjoyed in this state by all persons, natural or artificial, from time immemorial.”¹

The Kansas statute which required an employer of labor, upon request of a discharged employee, to furnish in writing the true cause or reason for such discharge, was annulled on the ground that it was a police regulation, and was in conflict both with the 14th Amendment of the Federal Constitution, and with the clause of the state Constitution which secures liberty of speech.²

¹ *Wallace v. Georgia, C. & N. R. Co.* (1893) 94 Ga. 732, 22 S. E. 579 (act of October 21, 1891). These reasons are stated in the language of the syllabus written by the court. It was also laid down that “liberty of speech and of writing is secured by the Constitution, and incident thereto is the correlative liberty of silence, not less important nor less sacred. Statements or communications, oral or written, wanted for private information, cannot be coerced by mere legislative mandate at the will of one of the parties and against the will of the other. Compulsory private discovery, even from corporations, enforced, not by suit or action, but by statutory terror, is not allowable where rights are under the guardianship of due process of law.”

² *Atchison, T. & S. F. R. Co. v. Brown* (1909) 80 Kan. 312, 23 L.R.A.(N.S.) 247, 133 Am. St. Rep. 213, 102 Pac. 459, 18 Ann. Cas. 346 (Gen. Stat. 1901, § 2422). The court reasoned thus: “It may be said that, if the law is valid, the company need have no con-

cern as to the effect of its compliance with the letter of the law. This leads us to the principal contention of the company, that the law is unconstitutional; that it is repugnant to the 11th section of the Bill of Rights of the state of Kansas, which provides that ‘all persons may freely speak, write, or publish their sentiments on all subjects, being responsible for the abuse of such right.’ It is also contended that the law is repugnant to the 14th Amendment to the Constitution of the United States, which provides: ‘No state shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law.’ It has been conceded in argument that, in the absence of a contract of employment for a definite term, the master may discharge the servant for any reason or for no reason, and that the servant may quit his employment for any reason or for no reason. Such action on the part of the employer or the employee, where no obligation is

On the other hand, the Texas enactment of a similar tenor, applying to all corporations, has been sustained by the court of civil appeals against the objections that it denies to corporations liberty of speech; that it is repugnant to the "due process" clauses of the Federal and state Constitutions; that it denies to corporations the equal protection of the laws; that it violates the 4th Amendment of the Federal Constitution, forbidding unreasonable searches and seizures; that it is legislation *ex post facto*; and that it impairs the obligation of contracts.³

The present writer ventures to express the opinion that enactments of this type should be upheld as valid. Their essential effect is to convert what is conceded to be a moral duty (see § 2013, *ante*), into a legal one. The theory that a constitutional provision which merely purports to secure freedom of speech includes by implication a guaranty of the "liberty of silence" seems to involve some very questionable logic.

violated, is an essential element of liberty in action. Can one, then, be compelled to give a reason or cause for an action for which he may have no specific reason or cause, except, perhaps, a mere whim or prejudice? Again, is not the freedom to remain silent—neither to write or publish anything on a certain subject—involved as an element in the guaranty that 'all persons may freely speak, write, or publish their sentiments on all subjects, being responsible for the abuse of such right?' It would seem that the liberty to remain silent is correlative with the freedom to speak. If one must speak, he cannot be said freely to speak. . . . When the relation of employer and employee has ceased by discharge or by quitting the employment, if the employee has been efficient and trustworthy the employer may be under a moral obligation to benefit the employee by giving him a statement to that effect. On the other hand, if the employee has been inefficient or untrustworthy, it may be the employer's moral duty to furnish a prospective employer, upon request or perhaps without request, a statement of these facts. But the former employer is under no legal obligation so to do, either to his exemployee or to the prospective employer. The public has no interest in the matter, and in neither case can such a duty be imposed as a

police regulation; and the attempt by statute to impose the furnishing of such a statement is an interference with personal liberty. The mere matter of time requisite to comply with the requirement of the statute is perhaps a matter of trifling consideration, yet if the state may compel the sacrifice of a few minutes of the time of one person for another, may it not compel the sacrifice of a few days of time? Where and upon what principle shall the limit be placed? Again, if the employer can be compelled to state the true cause of discharge, it implies that he should state the facts as he understands them, and the facts may be in dispute and may be regarded by the employee as libelous. Litigation may result therefrom which might be a great burden to the employer, although successfully defended. We think the state can impose no such possible burden. As in many other relations in life, the employer may be silent and be safe, or, at his option, he may be courteous and fulfil his moral obligation. It is a personal privilege."

³ *St. Louis Southwestern R. Co. v. Hixon* (1910) — Tex. Civ. App. —, 126 S. W. 338. Referring to the cases above cited, the court said that, even if the statutes construed in the cases cited were in all respects similar to the Texas statute, it would not be inclined to follow them.

b. Blacklisting.—By one of the sections of a Minnesota statute it is made unlawful for any company, corporation, or partnership to permit any of its agents to blacklist any discharged employee, or seek to prevent such discharged employee, or any employee who might have voluntarily left such company's or person's service from obtaining employment from any other person or company. This enactment has been sustained against the objections that it violates the "due process" clause of the Federal Constitution, and also the provisions of the state Constitution which prohibit class legislation, and declare that no member of the state shall be disfranchised or deprived of any rights or privileges secured to any citizen, unless by the law of the land or the judgment of his peers.⁴

By another section of this statute it is made unlawful for any two or more employers or any two or more corporations to combine, or to agree to combine or confer together, for the purpose of interfering with, or preventing, any person or persons from procuring employment, either by threats, promises, or by circulating or causing to be

⁴ In *State ex rel. Scheffer v. Justus* (1902) 85 Minn. 279, 56 L.R.A. 757, 89 Am. St. Rep. 550, 88 N. W. 759 (Laws 1895, chap. 174), the court said: "It is insisted that an employer of labor has the natural right, under the Constitution, state and Federal, to give such advice and information as he desires with respect to his employees, whether they have been discharged for cause or without cause, or whether they have voluntarily left the employment. This leads to a consideration of what the offense is, as set forth by the provisions of § 2. An employee who voluntarily leaves his employment is one who has the right to do so. He violates no contract obligations. Presumably, he is an employee in good standing, and leaves because it is to his advantage so to do; and if he seeks employment elsewhere he is entitled to the presumption that his reputation as an employee has been unharmed by the fact of his leaving. The fact that such an employee voluntarily abandons his employment does not give the employer a right to prejudice his employment elsewhere. Under such circumstances, a communication designed to prevent such employment is presumably a reflection upon the standing of the employee. It is no answer to say that the employer may have cause for making such communication; that it may be to the advantage of the

new employer, and for the mutual advantage of all such employers, to have notice of the character of the employee. If there is any valid reason for such communication, it would be available only as a matter of defense. The act does not attempt to interfere with the right of an employer to discharge an employee for cause or without cause. It does not seek to prohibit an employer from communicating to other employers the nature and character of his employees, when the facts would be for their interests. While such interference by an employer is not expressly characterized as malicious, that intent is necessarily implied. It is the purpose of this law to protect employees in the enjoyment of those natural rights and privileges guaranteed them by the Constitution, *viz.*, the right to sell their labor and acquire property thereby." The contention that the statute was class legislation, because it was applicable only to corporations or partnerships, as distinguished from individual employers, was rejected on the ground that a construction of its terms showed that it was intended to cover all descriptions of employers; and that employers, as distinguished from employees, did not constitute a "class" within the meaning of the constitutional provision which forbade such legislation

circulated blacklists, or for the purpose of procuring and causing the discharge of any employee or employees by any means whatsoever. It has been held that this enactment also is a valid exercise of the police power, and not objectionable as class legislation.⁵

2868. Enactments declaring the discharge of employees for certain causes to be unlawful.—A Tennessee statute which forbids any corporation, joint-stock company, or association to discharge any employee, or threaten to do so, for voting or not voting at any election, or for or against any candidate or measure, or for trading or not trading with any particular person or class of persons, and also provides that any officer or agent of any corporation, etc., who shall make or execute any notice or threat so forbidden shall be guilty of a misdemeanor, was pronounced invalid on the grounds, (1) that it contravened the Federal Constitution by denying corporations the equal protection of the laws, and (2) that the failure to include partnership and individuals within the purview of the enactment rendered it repugnant to the provision of the state Constitution which prohibits any special grant of privileges, immunities, or exemptions.¹

⁵ *Joyce v. Great Northern R. Co.* (1907) 100 Minn. 225, 8 L.R.A.(N.S.) 756, 110 N. W. 975. The court said: "It is contended by defendant that the sole object and purpose of this statute was to prevent conspiracy on the part of employers designed to coerce their employees. We do not so construe the statute. The title to the act, it is true, tends to show that the statute was intended originally to be limited to preventing the practice on the part of the employers of blacklisting, coercing, or unduly influencing their employees; but the title is not the sole guide in construing the enactment thereunder. That portion of the statute here under consideration is pertinent to the subject-matter expressed in the title, and goes far beyond the restrictive view given by defendant's counsel. . . . The statute under consideration is in line with other similar legislation designed to, in a measure, remedy existing evils, and was undoubtedly intended as a further check on employers, and to declare their acts, in so far as taken for the purpose of preventing laborers from obtaining employment, unlawful."

Referring to the case cited in the preceding note, the court said: "Although this particular part of the statute was not there before the court, the decision

made applies, and sustains the view that it is not unconstitutional. It applies to employers as a class, operates equally upon all, and is not, therefore, obnoxious to constitutional principles. Its basic principle is found in the declaration of our fundamental law that there shall be a certain remedy for all wrongs, and the further general rule that every wrongful act of a person which causes temporal loss or damage to another is an actionable tort. *Graham v. St. Charles Street R. Co.* (1895) 47 La. Ann. 214, 27 L.R.A. 416, 49 Am. St. Rep. 366, 16 So. 806."

¹ In *State v. Nashville, C. & St. L. R. Co.* (1911) 124 Tenn. 1, 135 S. W. 773, Ann. Cas. 1912D, 805, the court said: "The statute in question applies to all corporations, regardless of the business which they were incorporated and authorized to conduct, whether they be quasi public, as in case of public-service corporations, or private corporations, such as those created to conduct a mercantile, manufacturing, or other business, located at one point or extending over many counties, with large or small capital, or having in their service thousands or only a few employees. It does not apply to natural persons, either as individuals or members of a partnership or firm, engaged in conducting the

2869. Enactments as the making of false representations whereby workmen are induced to go to other places.—An Illinois statute by which it was declared to be unlawful to influence or engage workmen to change from one place to another in the state, or bring workmen into the state, by means of false representations concerning the character of the work, or as to the existence or nonexistence of a strike, etc., was pronounced invalid, on the ground that it produced an unjustifiable discrimination in respect of employers who hired workmen coming from another place.¹

same business, at the same place, in the same manner, and with similar employees. New burdens and restrictions are placed upon corporations the property of which belongs to individual shareholders, which are not placed upon natural persons engaged in the same business, conducted in the same way, and at the same place. We can see no good reason or natural and reasonable basis for this discrimination. None has been suggested or can be suggested, for they do not exist. The application of the statute is made to depend solely upon whether the employer is a natural or artificial person, between which, within the protection of the constitutional provisions invoked, there is no distinction. The distinction made is in the character of the employer, and not in that of the employment or business conducted."

¹*Josma v. Western Steel Car & Foundry Co.* (1911) 249 Ill. 508, 94 N. E. 945. The court said: "By the general law of contracts a misrepresentation by a party to a contract of a material fact knowingly made, with the intention of deceiving, and which does deceive, the other party, is a fraud which may avoid the contract entered into on the faith of it or may give a cause of action for damages. It does not, however, ordinarily subject the party making it to a criminal liability. Such a misrepresentation could at common law be no more than a mere private cheat, which was a civil injury, only, for which an action to recover damages would lie but which was not an indictable offense." The court then referred to the application of this rule with respect to certain classes of contracts, and proceeded as follows: "Truth and fair dealing should be observed in all business transactions, but the law should treat all men alike. It

should not impose upon one class of men a liability for attorneys' fees in a civil suit and a criminal liability for deceit in obtaining a contract, while leaving all other men subject only to the civil liability imposed upon them by the common law under like circumstances. This statute imposes upon the employers of workmen coming from another place to their place of employment a different measure of liability, both civil and criminal, for their wrongful acts, from that imposed upon other persons. It is therefore invalid unless circumstances exist making its enactment essential to the public health, morals, safety, or welfare. . . . The legislature may, in the exercise of the police power, classify persons if the classification is based upon some reasonable distinction having reference to the object of the legislation, but there can be no discrimination in legislation unless there is an actual difference of condition. The class to whom this act applies is workmen changing from one place to another. The representations aimed at are those which concern the kind and character of the work, of the compensation, the sanitary and other conditions of the employment, and the existence of a strike or other labor trouble. These conditions, or some of them, are as important to the stenographers in an office, the clerks in a store or a bank, the teachers in a school, or any of the professional or semiprofessional people who are employed by others, as to the workmen mentioned in the act. They are as important to the workman who does not leave his home for employment as to him who does. If persons entering into contracts of employment may be placed upon a different footing from persons entering into other contracts in the manner provided in this act, it can be only by

2870. Enactments imposing a penalty upon the commission of certain acts by servants, while engaged in their work.— A provision in a mining act by which a penalty is imposed upon the intentional “entering of any place in a coal mine against caution, or in disobedience of any order given in carrying out the provisions of the statute, . . . whereby the lives or health of persons or security of the mine or machinery is endangered,” has been upheld against the objection that it involves a delegation of legislative power.¹

The validity of an enactment which imposes a penalty upon employees of railroad companies who burn, mutilate, haul off, or bury stock killed by trains, has been affirmed against the objection that it is special legislation.²

2870a. Enactments forbidding the employment of alien laborers.—

The provisions of the Constitution of California, and of the corresponding statute passed in pursuance of its mandate, prohibiting the employment of Chinese by corporations, was pronounced invalid, as being in conflict with the clauses of the said 14th Amendment of the Federal Constitution, which provides that no state shall deprive any person of life, liberty, or property without due process of law, and that no state shall deprive any person within its juris-

an act sufficiently comprehensive to include all persons subject to the evil aimed at,—the deception of employees as to the terms, character, and conditions of their employment. A strike might exist among the telegraphers of a city, but the employer would not violate this statute if he employed other telegraphers without notifying them of the strike. A tailor shop might be unsanitary, but the employer would not violate this statute so long as he employed only resident tailors. The statute cannot be sustained which applies to some cases and does not apply to other cases not essentially different in kind. This statute is an arbitrary enactment, not operating equally on all persons under like conditions, but special in its operation, and it is therefore violative of constitutional rights.”

¹ *Koppala v. State* (1908) 15 Wyo. 398, 89 Pac. 576. The court said: “The law cannot nor could the legislature determine the existence of gas or fire damp in any room of a mine, or its unsafe condition at any particular time. The law is not suspended nor enforced at the whims of the mine superintendent or the mine boss. It is continually in force, and it is a combination of

conditions and the intentional acts of one with reference thereto that constitutes the statutory offense. It is in the nature of quarantine or health laws, where the health officer determines certain questions of fact, and upon which he is authorized, if necessary to the public safety, to establish a quarantine. . . . There is nothing in the act but what is analogous to provisions contained in health laws and for the public safety, usually referred to as laws in the nature of police regulations, and in that sense there is no delegation of legislative power. 8 Cyc. 863.”

² *Bannon v. State* (1887) 49 Ark. 167, 4 S. W. 655. The court said: “The power of the legislature to impose upon railroad companies the obligation of affording the stock owners every reasonable facility for obtaining the evidence of the injury he has sustained by the running of their trains, and of enforcing the performance of the duty by prescribing a punishment for its neglect, cannot be doubted. The right is found in the general control which the state has reserved over all agencies for the public safety and protection, and to guard properly the rights of other persons.”

diction of the equal protection of the laws. The opinion was also expressed that the clause of the state Constitution which provides that all general laws passed for the formation of private corporations may be altered from time to time, or repealed, did not authorize the legislature to forbid the employment by corporations of persons of a particular class or nationality.¹

This decision was relied on as an authority for annulling an Idaho statute which declared it to be unlawful for any county or municipal or private corporation, whether domestic or foreign and doing business in the state, to employ any alien who had neither become naturalized nor declared his intention to become a citizen.²

The Illinois enactment which prohibits the employment of alien laborers on public work has also been annulled on the ground of its being an unlawful interference with the right of contract.³

A Pennsylvania act "regulating the employment of foreign born, unnaturalized male persons over twenty-one years of age, and imposing a tax on the employers of such persons," etc., has been annulled on the ground that it denied the equal protection of the laws and also contravened the provision of the Constitution of Pennsylvania, which provides that "all taxes shall be uniform upon the same class of subjects."⁴

2871. Enactments imposing a tax on employers of aliens.— A Pennsylvania law which imposed on every employer of foreign-born unnaturalized male adults a tax of 3 cents for each day that one of them might be employed, and which authorized the deduction of that sum from the wages of such employees, was held to deny to the em-

¹ *Re Parrott* (1880) 6 Sawy. 349, 1 Fed. 481. Hoffman, D. J., said: "I am therefore of opinion that, irrespective of the rights secured to the Chinese by the treaty, the law is void, as not being a 'reasonable,' bona fide, or constitutional exercise of the power to alter and amend the general laws under which corporations in this state have been formed; that it would be equally invalid if the proscribed class had been Irish, German, or Americans; that the corporations have a constitutional right to utilize their property by employing such laborers as they choose, and on such wages as may be mutually agreed upon; that they are not compelled to shelter themselves behind the treaty

right of the Chinese to reside here, to labor for their living and accept employment when offered; but they may stand firmly on their own right to employ laborers of their choosing, and on such terms as may be agreed upon, subject only to such police laws as the state may enact with respect to them, in common with private individuals."

² *Re Case* (1911) 20 Idaho, 128, 116 Pac. 1037.

³ *Chicago v. Hulbert* (1903) 205 Ill. 346, 68 N. E. 786.

⁴ *Juniata Limestone Co. v. Fagley* (1898) 187 Pa. 193, 42 L.R.A. 442, 67 Am. St. Rep. 579, 40 Atl. 977.

ployees the equal protection of the laws.¹ *The ratio decidendi* was that the enactment discriminated against the class of aliens designated; that "it interposed, to the pursuit by them of their lawful avocations, obstacles to which others under like circumstances were not subjected;" that "it imposed upon them burdens which were not laid upon others in the same calling and condition;" and that the tax was "an arbitrary deduction from the daily wages of a particular class of persons." It was also laid down that the equal protection which is guaranteed by the 14th Amendment is not restricted to citizens, but "secures to every person within the jurisdiction of the state exemption from any burdens or charges except such as are equally laid upon all others under like circumstances."

2872 Enactments prohibiting peonage.—The congressional statute by which "the holding of any person to service or labor under the system known as peonage is abolished and forever prohibited" in all the territories and state has been pronounced valid.¹

The question, how far statutes which purport to impose a criminal liability upon employees who abandon their contracts are invalid as being in conflict with the above statute and the 13th Amendment, is discussed in §§ 2833 *et seq.*, *ante*.

2873. Enactments relating to apprentices.—The New York enactment empowering the specified juvenile asylum to bind out the chil-

¹ *Fraser v. McConway & T. Co.* (1897) 82 Fed. 257 (act of June 15, 1897).

¹ *Clyatt v. United States* (1905) 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429 (U. S. Rev. Stat. §§ 1990 and 5526, U. S. Comp. Stat. 1901, pp. 1266 and 3715). The court said: "Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. But peonage, however created, is compulsory service, involuntary servitude. The peon can release himself therefrom, it is true, by the payment of the debt, but otherwise the service is enforced. A clear distinction exists between peonage and the voluntary performance of
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labor or rendering of services in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or continuance of the service. . . . That which is contemplated by the statute is compulsory service to secure the payment of a debt. Is this legislation within the power of Congress?" It was pointed out that the 13th Amendment of the Federal Constitution had, by expressly empowering Congress to enforce by appropriate legislation the prohibition against slavery and involuntary servitude, created an exception to the general rule, that the ordinary relations of individual to individual are subject to the control of the states. The court,

dren in its charge to persons in other states has been held to be a valid exercise of the police power.¹

The validity of a South Carolina enactment which provided that, in cases where the state officials intrusted with the function of binding out poor children as apprentices desired to procure the discharge of an apprentice, they were to proceed by application to a justice of the peace, and that from his decision an appeal should lie to a circuit court, was sustained against the objection that it infringed the right of trial by jury. The *ratio decidendi* was "that when parties are left free to contract or not, and do contract, they are supposed to do so, in reference to the existing laws in relation to the subject-matter of the contract;" and that "the parties can, by express stipulations, dispense with . . . trial by jury, as for instance, by a reference to arbitration."²

after reviewing some of the authorities, proceeded thus: "It is not open to doubt that Congress may enforce the 13th Amendment by direct legislation, punishing the holding of a person in slavery or in involuntary servitude except as a punishment for crime. In the exercise of that power Congress has enacted these sections denouncing peonage, and punishing one who holds another in that condition of involuntary servitude.

. . . We entertain no doubt of the validity of this legislation, or of its applicability to the case of any person holding another in a state of peonage, and this whether there be municipal ordinance or state law sanctioning such holding. It operates directly on every citizen of the Republic, wherever his residence may be."

¹*People ex rel. Splain v. New York Juvenile Asylum* (1874) 2 Thomp. & C. 475. The court said: Such legislation "is essential to the good order and protection of the community, and constitutes a part of the general police power of the state. That power cannot be more humanely and usefully exercised than it is by making salutary and wise provisions for the education, improvement, comfort, and security of the destitute, homeless, and needy children found in the large cities of the state. Both their own usefulness and prosperity, and the interests of the public, are greatly promoted by its judicious and

discriminating use. No case could illustrate the wisdom and propriety of such legislation more completely than the present. Under its provisions the child of the relator, whom she proved unable to care for and maintain, was by her voluntarily surrendered to the custody of a charitable institution, by whose interposition he has found a friendly and hospitable home, in which his education has been provided for and his wants completely supplied. The interests of the child himself, as well as those of his mother, will undoubtedly be best subserved by leaving him during the residue of his minority among the new friends, who, the evidence shows, have become interested in his welfare."

²*Belcher v. Orphan House* (1822) 2 McCord, L. 23. Referring to the given statute (of 1740), the court said: It "creates the tribunal resorted to in this case, and invests it with full powers to determine all matters in dispute between them. Now, according to the rules laid down, the parties are supposed to assent to the terms which the act prescribes; and they are as much bound by it as if every article and clause had been incorporated in the indenture, and their assent expressed; and if the general rule be good, surely it applies with much greater force to cases where the parties, as in this case, derive their power to contract wholly from the law itself; and when any con-

2874. Enactments affecting the vicarious liability of a master to third persons.—*a. Criminal liability of railroad companies for the negligence of their servants.*—A statute by which it is provided that railroad corporations may be indicted and fined in case of the loss of life by reason of the negligence or carelessness of the proprietors or their servants has been sustained against the objections (1) that it subjects such corporations to additional and onerous liabilities, and is consequently an infringement of their vested rights;¹ (2) that it is a partial law, “not applicable to common carriers generally, nor even to carriers by steam, but confined to railroads;”² and (3) that it undertakes to make corporations criminally liable for the misconduct of their officers and agents in the discharge of their duties.³

dition, inconsistent with or repugnant to the law, would be wholly void. I am aware that this principle might be carried so far as to give effect to laws contrary to, and subversive of, the Constitution; but its application appears to me to be limited by marked distinctions. If, for instance, an act be manifestly repugnant to the Constitution, the parties are not supposed to contract in reference to the act, but in reference to the Constitution, as the paramount law. And so long as it is confined in its application to legitimate subjects of legislation, no mischief can result from it: and there can be no question that the act under consideration is of this character.”

¹*Boston, C. & N. R. Co. v. State* (1855) 32 N. H. 215. Under this head the court made the following remarks: “It is asserted that the legislature has no power to infringe either the express or implied privileges of a corporation, and this principle in the abstract we are inclined to admit. If this case falls within it, it is governed by it. But we think this principle cannot be construed to limit the general powers of legislation, where such legislation merely regulates the existing rights and duties of corporations, or provides new modes of enforcing acknowledged obligations. *Camden & A. R. Co. v. Briggs* (1848) 2 N. J. L. 406; *Galena & C. Union R. Co. v. Loomis* (1852) 13 Ill. 548, 56 Am. Dec. 471. This statute provides a new mode of enforcing the admitted duty of these bodies to conduct their business with such care and prudence as not to endanger the lives and limbs

of those whom they undertake to transport, and their obligations to compensate those who suffer by their failure to perform their duty, for the damages sustained. It was never a right of these corporations to conduct their business so carelessly as to destroy the lives of their customers, either by an express or implied grant.”

²With regard to this contention the court said: “The force of this objection is admitted, in cases where a law is made applicable to a class out of a large number, all standing substantially in the same position; but this law applies to a class well defined, of common carriers distinguished by the circumstance that they use, in their business, steam locomotives, driven at a rate of speed known in no other mode of traveling, and attended with risks peculiar to themselves, and far exceeding those of any other carriers. The same reason for this provision does not apply to any other class of persons, and we think the law is free from just exception on this account.”

³The court said: “If the laws impose duties of a general and public character upon corporations, they must provide modes to compel their performance; and we are unable to see any reason why the mode of prosecution by indictment is open to any objection which would not equally apply to any kind of criminal prosecution. Corporations necessarily transact their business by means of agents. If they are held responsible criminally, it must generally, perhaps always, be for acts or neglects of those agents. If they are thus

b. Regulation of vehicles on highways.—A Connecticut statute provides that “every driver of any vehicle who shall, by neglecting to turn to the right on meeting another vehicle on a public highway, drive against it and injure its owner or any person in it, or the property of any person, shall pay to the person injured treble damages and costs;” and that “the owner of such vehicle shall, if the driver be unable to do so, pay such damages, to be recovered by a writ of *scire facias*.” In one case it was held that the word “owner” in the last clause denotes the person in control of the vehicle, either mediately or immediately, and not necessarily the actual owner. The *ratio decidendi* was that any other construction would make the owner of a vehicle liable for the acts of a person in possession of it, over whom he had no control, and to whom he did not stand in the relation of master and principal, and that an act which should thus arbitrarily and without reason make one person liable for the acts of another would be void, either as being contrary to natural justice, or as violating the article of the Constitution by which the taking away of any person’s property without due process of law is forbidden.⁴ But in a later case this statute was declared to be a valid exercise of the police power for the protection of the persons and property of travelers on public highways. It was also sustained against the objections that it is repugnant to the constitutional provisions which prohibit the taking of property without due process of law, and guarantee the right of trial by jury.⁵

2875. Enactments prescribing the qualifications requisite for persons who follow certain occupations.—*a. Generally.*—The general principles with reference to which the validity of enactments of this description is determinable have been thus stated by the Supreme Court of the United States: “It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to everyone on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the

answerable for negligence and omission 291. Gen. Stat. act 16, pt. 1, chap. 7, of agents, there seems no well-founded § 21, Rev. Stat. 1888, § 2960, Gen. Stat. objection to their being made liable, in 1902, § 2036.

a proper case, for their acts.”

⁵ *Levick v. Norton* (1883) 51 Conn.

⁴ *Camp v. Rogers* (1877) 44 Conn. 461.

estate, acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society. The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud. As one means to this end it has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, and with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.”¹

The number of illustrative decisions in this section has been enlarged by the citation of several cases involving the validity of statutes which are not specifically applicable to servants, but prescribe in general terms the obligatory qualifications of persons who follow certain professions or trades.

b. Medical practitioners.—A statute which requires every practitioner of medicine in the state to obtain a certificate from the state board of health that he is a graduate of a reputable medical college, and which makes the practice of medicine by any person without such certificate a misdemeanor, punishable by fine or imprisonment, is not repugnant to the “due process” clause of the Federal Constitution.²

¹ *Dent v. West Virginia* (1888) 129 U. S. 124, 32 L. ed. 626, 9 Sup. Ct. Rep. 231. For an extract from the opinion. see subsec. a, *supra*.

² *Dent v. West Virginia* (1889) 129

c. Architects.—The California statute which provides for the appointment of a board of architecture to make regulations for the examination of certified architects has been sustained against the objections that it is a delegation of legislative power, and that it is repugnant to the provision of the state Constitution which prohibits the granting of "special privileges and immunities."³

d. Engineers.—The Federal Supreme Court and the supreme court of Alabama have sustained, as being a valid exercise of the police power, two enactments relating to the qualifications of locomotive engineers. By one of them a penalty is imposed upon all engineers who operate trains without having satisfactorily passed the official examinations appointed to be made for the purpose of testing their general competence in respect of technical knowledge, skill, and character.⁴ The other requires the examination of all engineers for the purpose of ascertaining whether they suffer from color blindness or other defects of vision.⁵

The Federal Supreme Court has held that the section which imposes upon railway companies a liability for the fees to be paid for the examination is not unconstitutional, as being a deprivation of property without due process of law.⁶

But a different doctrine has been applied by the supreme court of Alabama.⁷

The Minnesota "boiler inspectors act" requires all persons intrusted with the operation of steam boilers or steam machinery to procure a license, but specially excepts from its purview locomotive engineers and boilers inspected and certified as safe by the inspector of companies whose business it is to insure boilers. The contentions that this exceptive provision produced an improper classification of per-

³ *Ex parte McManus* (1907) 151 Cal. 331, 90 Pac. 702.

⁴ *Smith v. Alabama* (1887) 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *McDonald v. State* (1886) 81 Ala. 279, 60 Am. Rep. 158, 2 So. 829; *Smith v. State* (1888) 85 Ala. 341, 6 So. 928.

⁵ *Nashville, C. & St. L. R. Co. v. Alabama* (1888) 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 338, 9 Sup. Ct. Rep. 28; *Louisville & N. R. Co. v. Baldwin* (1888) 85 Ala. 619, 7 L.R.A. 266, 5 So. 311.

⁶ *Nashville, C. & St. L. R. Co. v. Alabama, supra*. The court said: "It is merely imposing upon them the expenses necessary to ascertain whether

the employees possess the physical qualifications required by law."

⁷ *Louisville & N. R. Co. v. Baldwin, supra*. The majority of the court considered itself at liberty to take this position for the reason that the point had not been properly raised and definitely ruled upon by the Federal court. But with all deference, it is submitted that this reading of the Federal decision was erroneous.

In *Baldwin v. Kouns* (1887) 81 Ala. 272, 2 So. 638, no ruling was made upon this point, but for the reason that as the applicant for examination and medical examiner each claimed and asserted rights under the statute, neither could be heard to assail its constitutionality.

sons and subjects, and that the portion relating to boilers inspected by insurance companies is unconstitutional, as being an unwarranted and unreasonable delegation of the police power of the state to such companies, have been rejected.⁹

By one of the sections of the Ohio statute regulating the appointment of stationary engineers, it was provided that any engineer who had been employed continuously as a steam engineer in the state for a period of three years next prior to the passage of the act, and who filed with his application a certificate of such a fact, under oath, accompanied by a certificate from his employer or employers, verifying the same, or who held a license issued to him under any ordinance of a municipal corporation of this state, should be entitled to a license without further examination. It was held that this provision arbitrarily formed a favored class, and was therefore repugnant to the clause of the state Bill of Rights which guarantees equal protection and benefit, and also in conflict with the professed purpose for which the Constitution was established; *viz.*, to promote the common welfare of citizens.¹⁰

It has been held that the Minnesota enactment which divides engineers into four classes, and prescribes the qualifications of each class, is not in conflict either with the "due process" clause of the Federal Constitution, or with the provision of the state Constitution which prohibits special legislation.¹¹

e. Railroad conductors.—An Ohio statute which declared it to be unlawful to employ any person in the capacity of conductor on a passenger train unless such person had had at least two years' experience in the position of conductor of either a passenger, freight, or construction train within six years next preceding the time of such employment, but provided that the act should not be construed so as to prevent any such railroad from retaining conductors in its employ at the time of the passage of the act, was pronounced unconstitutional, as affecting unequally the employees in the same class of service.¹²

⁹ *State ex rel. Graham v. McMahon*, (1896) 65 Minn. 453, 68 N. W. 77. The court pointed out that "locomotives are subject to frequent—almost continual—inspection, while locomotive engineers must of necessity be well qualified and skilful, and, further, that if the latter fail to exercise high degree of ability and care, they are at once discharged."

¹⁰ *Harmon v. State* (1902) 66 Ohio St. 249, 58 L.R.A. 618, 64 N. E. 117 (act of March 1, 1900).

¹¹ *Hyvonen v. Hector Iron Co.* (1908) 103 Minn. 331, 123 Am. St. Rep. 332, 115 N. W. 167, (Rev. Laws 1905, §§ 2180, 2181).

¹² *Cleveland, C. C. & St. L. R. Co. v. State* (1903) 26 Ohio C. C. 348, affirmed without opinion in (1904) 70 Ohio St.

f. Undertakers.—A New York enactment which provided that a person not engaged in the business of undertaking should not engage in it unless he had been duly licensed as an embalmer, and employed as an assistant to a licensed undertaker continuously for three years, and that, if a firm or corporation desired to engage in the business, each member of the firm or manager of each place of business conducted by the corporation shall be a licensed undertaker, has been annulled, as being repugnant to the "due process" clauses of the Federal and state Constitutions.¹³

g. Plumbers.—A Minnesota act requiring journeymen plumbers to pass an examination and procure certificates of competency was held to be unconstitutional both on the ground that it made an arbitrary and unjustifiable distinction between master and journeyman plumbers, and on the ground that the legislature had adopted an arbitrary basis of classification in restricting the application of the act to cities having more than 10,000 inhabitants, which had a system of sewers and waterworks.¹⁴ Similarly, a statute which declared it to be unlawful for a firm in New York city to engage in the business of employing a master plumber unless each and every member

506, 72 N. E. 1165. The court said that under the statute, "a person who has been a conductor of passenger, freight, or construction train for two years within the last six before the employment may be employed without examination as to his competency; but a person so employed for a term one day less than two years shall not be employed, however skilful and competent he may be; and a person who has been in the employ of the company for one day previous to the passage of the act may be retained, however incompetent and inexperienced he may be. The act creates arbitrarily two favored classes: Those who have had two years' experience in the last six before employment, and those who happened to be in the employ of the company at the time of the passage of the act. Similar and even more glaring inequalities might be pointed out, governing the employment of engineers and others. The act prescribes no standard and no test of efficiency; arbitrarily says who may labor at a given employment, and who may not; and fails to provide for the safety of the public, which must have been the purpose of any lawful exercise of the police power of the state." It was furthermore declared that "the limi-

tation of the act to 'any railroad company or companies running or operating a steam railroad in the state of Ohio, 30 miles in length or more, and the same having been operated for three years or more,' is a discrimination without reason, affecting unequally property not differing in kind or use, as well as employees in the same class of service."

¹³ *People v. Ringe* (1910) 197 N. Y. 143, 27 L.R.A. (N.S.) 528, 90 N. E. 451, 18 Ann. Cas. 474, affirming (1908) 125 App. Div. 592, 110 N. Y. Supp. 74. The court said: "The provisions of the statute requiring that the service must be continuous, and arbitrarily prohibiting the issuing of a license to a person to engage in the business of undertaking unless such persons has been an assistant to a licensed undertaker for the time therein specified, unnecessarily interferes with the common-law right to engage in a lawful business. It makes a particular form of acquiring skill and knowledge essential, and forfeits the right to count the time so engaged in that particular education at each time when there is a break in the continuity of the service."

¹⁴ *State ex rel. Chapel v. Justus* (1903) 90 Minn. 474, 97 N. W. 124 (Minn. Laws 1901, chap. 356).

had been registered after examination by the examining board of plumbers, has been pronounced invalid in so far as it prohibited the right to form a partnership for carrying on the business of master plumber.¹⁵

h. Horseshoers.—A New York statute requiring persons who practised the trade of horseshoeing to be examined, and to obtain a certificate from a board of examiners, and file the same with the clerk of the county in which it is proposed to practise the trade, has been held invalid, as an arbitrary interference with personal liberty and private property without due process of law. An attempt was made, but unsuccessfully, to justify it as a health law.¹⁶

A similar statute has been annulled in Washington, the court taking the position that it deprived citizens of their liberty and property without due process of law, and denied to them the equal protection of the laws. The trade of a horseshoer was also declared not to be a subject of regulation under the police power of the state, as a business concerning and directly affecting the health, welfare, or comfort of its inhabitants.¹⁷

An Illinois enactment of the same type, which provided for the regulation and licensing of horseshoers, has been pronounced unconstitutional as being an illegal interference with the right of the individual to adopt and pursue whatever calling he may choose, subject only to the restraint necessary to secure the common welfare.¹⁸

¹⁵ *Schnaier v. Navarre Hotel & Importation Co.* (1905) 182 N. Y. 83, 70 L.R.A. 722, 108 Am. St. Rep. 790, 74 N. E. 561. The court said: "It cannot be denied that the statute in question operates to prohibit two persons, situated as the firm in this case was, to enter into partnership for conducting a legitimate business. It prohibits a business man, with financial means and business ability, and a registered master plumber, with the requisite mechanical skill, from uniting the financial and business ability of the one with the energy and mechanical skill of the other in a partnership for conducting a legitimate business. The right to form partnerships for the conduct of business has existed from time immemorial, and any interference with that right must be regarded as an unwarranted interference with individual freedom, condemned by the Constitution. The feature of the statute to which I have referred would deprive a firm engaged in the plumbing business composed of half a dozen per-

sons, from enforcing contracts and collecting their bills for work done unless they could show that each and every member of the firm was a registered plumber; and if, as in this case, it was impossible for one of them to become registered, the firm must dissolve. A law that produces such results in its operation cannot be valid. . . . It is not within any reasonable or proper exercise of the police power, since a provision for the registration of the firm as such, or for the registration of one or more members of the firm who were skilled plumbers, to act for the firm, would be a sufficient protection to the public from all the dangers that the legislation was supposed to prevent or mitigate."

¹⁶ *People v. Beattie* (1904) 96 App. Div. 383, 89 N. Y. Supp. 193.

¹⁷ *Re Aubrey* (1904) 36 Wash. 308, 104 Am. St. Rep. 952, 78 Pac. 900, 1 Ann. Cas. 927.

¹⁸ *Bessette v. People* (1901) 193 Ill. 334, 56 L.R.A. 558, 62 N. E. 215.

i. Pilots.—It has been held that the Texas enactment which defines the obligatory qualifications of branch pilots, and regulates the manner of their appointment, is a valid exercise of the police power, for the reason that it is designed to protect life and property against the perils incident to navigation. The contention that it is repugnant to the “due process” clauses of the Federal and state Constitutions was rejected.¹⁹

The Washington statute which requires the applicant for a pilot’s license to be an American citizen and legal voter of the state, and to possess certain qualifications to be ascertained by the board of pilot commissioners, has been sustained against the objection that it discriminates between citizens, because it requires that the applicant shall be a qualified voter.²⁰

2876. Enactments imposing occupation license taxes.—*a. Employment agencies.*—In an Illinois case it was laid down with regard to a statute regulating employment agencies, that the section which required persons who maintain a private agency to obtain a license was a valid exercise of the police power.¹ But in a later case in which the remainder of the statute was pronounced unconstitutional, the court reached the conclusion that this section depended upon all the other provisions, and could not stand by itself.²

It has been held that the New York statute which is applicable to agencies in cities of the first and second class is not invalid, either as denying the equal protection of the laws, or as interfering with the right to carry on a lawful business without being hampered by statutory regulations.³

¹⁹ *Olsen v. Smith* (1902) — Tex. Civ. App. —, 68 S. W. 320 (Tex. Rev. Stat. 1895, art. 3796 *et seq.*)

²⁰ *State v. Ames* (1907) 47 Wash. 328, 92 Pac. 137 (Laws 1887–88, chap. 93), following *State ex rel. Griffith v. Newland* (1905) 37 Wash. 428, 79 Pac. 983, where a statute authorizing the appointment of road supervisors from among the qualified electors was upheld.

¹ *Price v. People* (1901) 193 Ill. 114, 55 L.R.A. 588, 86 Am. St. Rep. 306, 61 N. E. 844.

² *Mathews v. People* (1903) 202 Ill. 389, 63 L.R.A. 78, 95 Am. St. Rep. 241, 67 N. E. 28. See § 2865, note 1, *ante*.

³ In *People ex rel. Armstrong v. Ward* (1905) 183 N. Y. 223, 2 L.R.A. (N.S.) 859, 76 N. E. 11, 5 Ann. Cas. 325, affirming (1905) 107 App. Div. 617, 95 N. Y. Supp. 1152, with regard to the

first objection, the court said: “It seems to be well settled in this court and in the Federal court that the equality, within the contemplation of the 14th Amendment, does not necessarily include a territorial equality, and that legislation which, though limited in the sphere of its operations, affects alike all persons similarly situated within such sphere, is valid. *People v. Havnor* (1896) 149 N. Y. 195, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541; *Mallett v. North Carolina* (1901) 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241; *Barbier v. Connolly* (1885) 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Williams v. People* (1862) 24 N. Y. 405. Criminal laws are not necessarily unconstitutional, even if they bear unequally upon persons in different parts of the state.

b. Emigrant agents.—A Georgia enactment which provides that emigrant agents engaged in hiring laborers for work outside the state shall pay a license tax, and imposes no such tax upon persons engaged in hiring laborers for work within the state, has been sustained by the Federal Supreme Court against the objections (1) that it is in conflict with the 14th Amendment, because it restricts the right of the citizen to move from one state to another, and so abridges his privileges and immunities; (2) that it impairs the natural right to labor; and (3) that it is class legislation, discriminating arbitrarily and without a reasonable basis.⁴

The evil which the legislature may have in view in passing such laws may exist only in the great cities of the state, and have no existence in rural districts." The second objection was thus discussed: "The cases are abundant which hold that the individual has the right to carry on any lawful business, or earn his living in any lawful way, and that the legislature has no right to interfere with his freedom of action in that respect, or otherwise place restraints upon his movements. But, of course, these cases must all be understood as applying to laws that are not within the police power. If the statute comes fairly within the scope of the police power, it is a valid law, although it may interfere, in some respects, with the liberty of the citizen, which, of course, includes his right to follow any lawful employment. A statute to promote the public health, the public safety, or to secure public order, or for the prevention or suppression of fraud, is a valid law, although it may, in some respects, interfere with individual freedom. All business and occupations are conducted subject to the exercise of the police power. Individual freedom must yield to regulations for the public good. It may be laid down as a general principal that legislation is valid which has for its object the promotion of the public health, safety, morals, convenience, and general welfare, or the prevention of fraud or immorality. We think that such is the character of the statute in question. It was intended to regulate employment agencies in cities. The legislature had the right to take notice of the fact that such agencies are places where emigrants and ignorant people frequently resort to obtain employment and to procure information. The relations of a

person so consulting an agency of this character with the managers or persons conducting it are such as to afford great opportunities for fraud and oppression. and the statute in question was for the purpose of preventing such frauds, and, probably, for the suppression of immorality."

⁴ In *Williams v. Fears* (1900) 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128, affirming (1900) 110 Ga. 584, 50 L.R.A. 685, 35 S. E. 699, the court said: "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any state is a right secured by the 14th Amendment and by other provisions of the Constitution; and so as to the right to contract. The liberty, of which the deprivation without due process of law is forbidden, 'means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purpose above mentioned. . . .' But this act is a taxing act, by the second section of which taxes are levied on occupations, including, by paragraph ten, the occupation of hiring persons to labor elsewhere. If it can be said to affect the freedom of egress from the state or the freedom of contract, it is only inci-

c. Managing agents of certain kinds of business.—A statute imposing a license tax upon the domestic business carried on by the managing agents of domestic and foreign meat-packing houses has been sustained by the Federal Supreme Court against the objections that it denied to the agents of foreign houses the equal protection of the laws, and impaired the obligation of their contracts of employment.⁵

dentally and remotely. The individual laborer is left free to come and go at pleasure, and to make such contracts as he chooses, while those whose business it is to induce persons to enter into labor contracts and to change their location, though left free to contract, are subjected to taxation in respect of their business as other citizens are. . . . Nor does it appear to us that the objection of unlawful discrimination is tenable. The point is chiefly rested on the ground that inasmuch as the business of hiring persons to labor within the state is not subjected to a like tax, the equal protection of the laws secured by the 14th Amendment is thereby denied. . . . We are unable to say that such a discrimination, if it existed, did not rest on reasonable grounds, and was not within the discretion of the state legislature." The provision construed was ¶ 10 of § 2 of the general tax act. The court approved *Sheppard v. Sumter County* (1877) 59 Ga. 535, 27 Am. Rep. 394, in which the supreme court of Georgia decided that the corresponding provision in the act of 1876, which required a license as preliminary to carrying on this business, was not unconstitutional on this ground, for the reasons, (1) that it did not appear that hiring for internal employment had become a business in Georgia, or was pursued as such by any person or persons, and (2) that the state could properly discriminate in its police and fiscal legislation between occupations of a similar nature, but of a dissimilar tendency,—between those which tended to induce the laboring population to leave, and those which tended to induce that population to remain.

In accord with the above rulings is *State v. Napier* (1901) 63 S. C. 60, 41 S. E. 13, where it was held that a South Carolina statute of a similar tenor is not invalid, either as abridging the privileges of the citizen, or as being dis-

criminatory, or as violating the principle of the uniformity of taxation.

In *State v. Hunt* (1901) 129 N. C. 686, 85 Am. St. Rep. 758, 40 S. E. 216, *Williams v. Fears, supra*, was followed. The court overruled a previous decision in so far as it conflicted with the doctrines of the Federal Supreme Court. In *State v. Moore* (1893) 113 N. C. 697, 22 L.R.A. 472, 18 S. E. 342, a similar statute was invalidated on two grounds (1) that, if considered as an exercise of the taxing power of the legislature, it was in contravention of the provision of the state Constitution which authorizes the legislature to tax "trades, professions, franchises," etc., and was void for want of uniformity; (2) that, as the act did not prescribe any regulation as to how the business should be carried on, nor any police supervision, and exacted a very large license fee, it was restrictive and prohibitory of the business, and consequently, if considered as an exercise of police power, was void for that reason.

The decision of the Federal Supreme Court has, it seems, also destroyed the authority of *Joseph v. Randolph* (1882) 71 Ala. 499, 46 Am. Rep. 347, in which an enactment of this description was pronounced invalid, on the ground that it imposed an indirect tax upon the citizen's right of free egress from the state, and operated so as to hinder the exercise of his personal liberty, and seriously to impair his right to emigrate.

⁵ In *Kehrer v. Stewart* (1905) 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403, affirming (1903) 117 Ga. 969, 44 S. E. 854, the court said: "There is no discrimination in favor of the agents of domestic houses, and, while we may suspect that the act was primarily intended to apply to agents of *ultra* state houses, there is no discrimination upon the face of the act, and none, so far as the record shows, upon its practical ad-

d. Agents of foreign insurance companies.—It has been held that a New Jersey statute imposing a license fee upon this class of agents does not abridge any right guaranteed by the state or Federal Constitutions.⁶

e. Laundries.—A city ordinance providing, under a penalty, that no person should establish, maintain, or carry on any laundry within certain limits, without first having obtained the consent of the board of supervisors, and that this provision should only be granted upon the recommendation of not less than twelve citizens and taxpayers in the block in which it was proposed to establish the laundry, has been pronounced void.⁷

2877. Enactments restricting the rights of municipal officers in respect of performing services for other employers.—An enactment which renders it unlawful for any officer of a municipality to act as an attorney for any public utility corporation doing business or exercising its franchises within the municipality has been sustained against the objection, (1) that it discriminates against corporations, and in favor of individuals, partnerships, and other unincorporated associations similarly situated, and (2) that it places arbitrary and unreasonable restrictions upon the occupation of practising law.¹

ministration. As we have frequently held, the state has the right to classify occupations and to impose different taxes upon different occupations. Such has been constantly the practice of Congress under the internal revenue laws. *Cook v. Marshall County* (1905) 196 U. S. 261, 275, 49 L. ed. 471, 476, 25 Sup. Ct. Rep. 233. What the necessity is for such a tax, and upon what occupations it shall be imposed, as well as the amount of the imposition, are exclusively within the control of the state legislature. So long as there is no discrimination against citizens of other states, the amount and necessity of the tax are not open to criticism here. The argument that the tax impairs the obligation of a contract between the petitioner and Nelson Morris & Company is hardly worthy of serious consideration. The power of taxation overrides any agreement of an employee to serve for a specific sum. His contract remains entirely undisturbed. There was no stipulation for an employment for a definite period; and if there were, it is inconceivable that the state should lose this

right of taxation by the fact that the party taxed had entered into an engagement with his employer for a definite period. The tax is an incident to the business, and probably might, under the terms of their contract, be charged up against the employer as one of the necessary expenses of carrying it on."

⁶ *Hickman v. State* (1898) 62 N. J. L. 499, 41 Atl. 942, affirmed in (1899) 63 N. J. L. 666, 44 Atl. 1099.

⁷ *Re Quong Woo* (1882) 13 Fed. 229. The general principle relied on is thus formulated in the headnote: Licenses for callings, trades, and employments may be required by the city authorities where the nature of the business requires special knowledge or qualifications, or where they are issued as a means of raising revenue for municipal purposes; but they cannot be required as a means of prohibiting any of the avocations of life which are not injurious to public morals, offensive to the senses, nor dangerous to public health and safety.

¹ *Boone v. State* (1911) 170 Ala. 57, 54 So. 109, Ann. Cas. 1912 D, 1065.

2878. Enactments prohibiting trusts.—The Indiana statute which prohibits persons from forming combinations for the purpose of preventing dealers and manufacturers from selling supplies to any dealer, manufacturer, or artisan has been sustained against the objection that it deprives the persons affected of their property without due process of law, and denies to them the equal protection of the laws.¹

2879. Enactments prohibiting wrongful interference by third persons with existing contracts.—The Georgia statute by which a penalty, recoverable in a civil action, is imposed for interference with the contractual relation of employer and employee, of landlord and tenant, and of landlord and cropper, hiring the tenant or employee, and renting or furnishing land to him, and by which it is provided that if the action fails, the defendant shall have judgment against the plaintiff for all costs and reasonable attorney's fees, has been sustained against the objections that it denies the equal protection of the laws, because the plaintiff is not given any right to recover attorney's fees, and that it violates the prohibition of the state Constitution against legislating on a subject-matter already covered by a general law.¹

The Alabama statute which declares it to be unlawful for any person knowingly to interfere with, employ, or induce to leave the service of another, a servant, etc., who has contracted in writing to serve such other person for any time not exceeding a year, before the expiration of the time so contracted for, has been sustained against the objections that it is an indirect attempt to punish the violation of a contract by fine and imprisonment,² and that it is in conflict with the 14th Amendment of the Federal Constitution, and the clause of the state Constitution which guarantees the right to enjoy life, liberty, and property.³ Both of these decisions turn upon the conception that the enticement of a servant is a tort at common law.

A municipal ordinance by which "picketing" for the purpose of intimidating and threatening the employees of a private industrial concern is declared to be a misdemeanor has been held to be a valid exercise of municipal power.⁴

2880. Enactments relating to arbitration between masters and servants.—A provision to the effect that, if a witness summoned by

¹ *Knight & J. Co. v. Miller* (1909) 172 Ind. 27, 87 N. E. 823, 18 Ann. Cas. 1146.

¹ *Johnson v. Hudspeth* (1911) 136 Ga. 771, 72 S. E. 69 (Civil Code [1910] §§ 3712–3714). For other decisions as to the validity of statutes allowing attorneys' fees, see § 2828, *ante*.

² *Tarpley v. State* (1885) 79 Ala. 271.

³ *State v. Nix* (1910) 165 Ala. 126, 51 So. 754.

⁴ *Re Williams* (1910) 158 Cal. 550, 111 Pac. 1035.

the board of arbitration refuses to attend or to testify, the board may apply to the circuit court, which shall then issue an attachment to bring in the witness and punish him for contempt, has been held unconstitutional, for the reason that "the power to punish for contempt is not a power conferred on the court by the legislature, but is inherent in the court, for one purpose only, that is, to maintain its own authority."¹

2881. Enactments prohibiting the performance of work on Sundays.—Some of the statutes belonging to this category expressly prohibit the masters from requiring or permitting their servants to work on Sundays, and it is obvious that those which are not specifically applicable to servants impliedly embrace such a prohibition. For practical purposes the effect of both these descriptions of statutes is identical, so far as the privileges of servants are concerned. In this respect, therefore, the actual operation of all Sunday Laws, whatever may be their actual tenor, is similar to that of the enactments which define the number of hours in each day, or the particular portion of each day, during which servants may be kept at work. But as the great majority of such laws are of a general scope, it would be out of place to undertake, in the present treatise, to analyze in detail all the cases in which their validity has been discussed. Except in those instances where some point of special importance is involved, we shall merely state the purport of each decision and the constitutional principle with reference to which it was rendered. The grounds upon which Sunday laws have been attacked are as follows:

(1) That they are not a proper exercise of the police power. This contention has been rejected in nearly every instance in which it has been put forward.¹ "The legislature having . . . power to enact

¹ *State ex rel. Haughey v. Ryan* (1904) 182 Mo. 349, 81 S. W. 435. 3: *Fowler Packing Co. v. Enzenperger* (1908) 77 Kan. 406, 15 L.R.A.(N.S.) 784, 94 Pac. 995; *Com. v. Louisville & N. R. Co.* (1882) 80 Ky. 291, 44 Am. Rep. 475; *State v. Bott* (1879) 31 La. Ann. 663, 33 Am. Rep. 224; *Com. v. Has* (1877) 122 Mass. 40; *State v. Ludwig* (1875) 21 Minn. 202; *People v. Moses* (1893) 140 N. Y. 214, 35 N. E. 499 (arguendo); *Re Rupp* (1898) 33 App. Div. 469, 53 N. Y. Supp. 927 (arguendo); *Ex parte Sundstrom* (1888) 25 Tex. App. 133, 8 S. W. 207; *Cooley*, Const. Law, 7th ed. p. 859, note 3.

¹ Besides the cases cited *passim* in the following notes, see *Swann v. Swann* (1884) 21 Fed. 299; *Ex parte Andrews* (1861) 18 Cal. 679 (overruling *Ex parte Newman* (1858) 9 Cal. 502); *Ex parte Bird* (1861) 19 Cal. 130; *Ex parte Moynier* (1884) 65 Cal. 33, 2 Pac. 728; *Foster v. Police Comrs.* (1894) 102 Cal. 483, 41 Am. St. Rep. 194, 37 Pac. 763; *Gunn v. State* (1892) 89 Ga. 341, 15 S. E. 458; *People v. Griffith* (1873) 1 Idaho, 476; *Voglesong v. State* (1857) 9 Ind. 112; *Schlict v. State* (1869) 31 Ind. 246; *Foltz v. State* (1870) 33 Ind. 215; *Armstrong v. State* (1908) 170 Ind. 188, 15 L.R.A.(N.S.) 646, 84 N. E. 509, 32 L.R.A. 659, 52 Am. St. Rep. 365, 43 N. E. 1108, it was held that a law prohibiting barbers from keeping open

laws to promote the order and to secure the comfort, happiness, and health of the people, it is within its discretion to fix the day when all labor, within the limits of the state, works of necessity and charity excepted, should cease. It is not for the judiciary to say that the wrong day was fixed, much less that the legislature erred when it assumed that the best interests of all required that one day in seven should be kept for the purposes of rest from ordinary labor."² There is high authority for the doctrine that statutes of this type are purely civil regulations, and only sustainable on that footing.³ However this may be, there can be no question that, even if it is permissible to predicate their validity upon the ground that Christianity is a part of the common law, "it is not necessary to resort to any such reason to sustain such legislation. The ground upon which such legislation is generally upheld is that it is a sanitary measure, and as such a legitimate exercise of the police power. It proceeds upon the theory, entertained by most of those who have investigated the subject, that the physical, intellectual, and moral welfare of mankind requires a periodical day of rest from labor, and, as some particular day must be fixed, the one most naturally selected is that which is regarded as sacred by the greatest number of citizens, and which by custom is generally devoted to religious worship, or rest and recreation, as this causes the least interference with business or existing customs."⁴

their shops on Sunday could not be sustained as an exercise of the police power, since it had no relation to the health, comfort, safety, and welfare of society. But this decision is obviously opposed to the general current of authority. It seems to be essentially inconsistent with *McPherson v. Chebanse* (1885) 114 Ill. 46, 55 Am. Rep. 857, 28 N. E. 454, where an ordinance prohibiting persons from keeping open their places of business in a city or village for the purpose of vending goods, wares, and merchandise on Sunday was held to be valid. This ruling was cited without any expression of disapproval in *W. C. Ritchie & Co. v. Wayman* (1910) 244 Ill. 509, 27 L.R.A. (N.S.) 994, 91 N. E. 695.

² *Hennington v. Georgia* (1896) 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086 (affirming 90 Ga. 396, 4 Inters. Com. Rep. 413, 17 S. E. 1009). This remark was made with reference to a Georgia statute by which the operation of trains on Sunday was forbidden. The court quoted with approval the follow-

ing remark of Mr. Justice Field in his dissenting opinion in *Ex parte Newman* (1853) 9 Cal. 502: "The prohibition of secular business on Sunday is advocated on the ground that by it the general welfare is advanced, labor protected, and the moral and physical well-being of society promoted."

³ *Specht v. Com.* (1848) 8 Pa. 312, 49 Am. Dec. 518; *Minden v. Silverstein* (1884) 36 La. Ann. 912; *Bloom v. Richards* (1853) 2 Ohio St. 387.

⁴ *State v. Pettit* (1898) 74 Minn. 376, 77 N. W. 225, affirmed in (1900) 177 U. S. 164, 44 L. ed. 718, 20 Sup. Ct. Rep. 666.

In *People v. Havnor* (1896) 149 N. Y. 195, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541, the court said: "According to the common judgment of civilized men, public economy requires, for sanitary reasons, a day of general rest from labor, and the day naturally selected is that regarded as sacred by the greatest number of citizens, as this causes the least inconvenience through interference

(2) That they deprive the persons affected of their property without due process of law. In most of the instances in which this objection has been relied upon, it has been overruled.⁵ But in one state it has been treated as a valid reason for annulling a statute applicable to barbers.⁶

(3) That they contravene the equality clauses of the Federal and state Constitutions. The decisions under this head are conflicting. Some of them proceed upon the broad doctrine that a court is not warranted in annulling a statute for the reason that its operation extends only to certain kinds of business,⁷ or to a single kind of busi-

ness. *Lindenmuller v. People* (1861) 33 Barb. 548. It is to the interest of the state to have strong, robust, healthy citizens, capable of self-support or bearing arms, and of adding to the resources of the country. Laws to effect this purpose, by protecting the citizen from overwork and requiring a general day of rest to restore his strength and preserve his health, have an obvious connection with the public welfare." Followed in *Moore v. Owen* (1908) 58 Misc. 332, 109 N. Y. Supp. 585.

In *Re New York* (1907; Sup. Ct.) 57 Misc. 52, 108 N. Y. Supp. 197, the court said: "The Christian Sabbath is one of the civil institutions of the state; and that for the purpose of protecting the moral and physical well-being of the people, and preserving the peace, quiet, and good order of society, the legislature has authority to regulate its observance and prevent its desecration by appropriate legislation."

See also the remarks of the court in *St. Joseph v. Elliott* (1891) 47 Mo. App. 418.

⁵ *State v. Dolan* (1907) 13 Idaho, 693, 14 L.R.A.(N.S.) 1259, 92 Pac. 995; *Re Jacobs* (1907) 13 Idaho, 720, 92 Pac. 1003 (all places of business with certain specified exceptions); *People v. Hoym* (1860) 20 How. Pr. 76 (exhibitions and dramatic performances); *Lindenmuller v. People* (1861) 33 Barb. 548 (exhibitions and dramatic performances); *People v. Havnor* (1896) 149 N. Y. 195, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541 (barbers); *Ex parte Northrup* (1902) 41 Or. 489, 69 Pac. 445 (barbers); *State v. Sopher* (1903) 25 Utah, 318, 60 L.R.A. 468, 95 Am. St. Rep. 845, 71 Pac. 482 (barbers); *Stark v. Backus*

(1909) 140 Wis. 557, 123 N. W. 98 (barbers).

⁶ *Eden v. People* (1896) 161 Ill. 296, 32 L.R.A. 659, 52 Am. St. Rep. 365, 43 N. E. 1108. The *ratio decidendi* was that the phrase "due process of law" was declared to be synonymous with "law of the land," and the "law of the land" signified a "general public law, binding upon all the members of the community, under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals."

⁷ *State v. Dolan* (1907) 13 Idaho, 693, 14 L.R.A.(N.S.) 1259, 92 Pac. 995; *Re Jacobs* (1907) 13 Idaho, 720, 92 Pac. 1003 (all places of business, with certain specified exceptions); *State v. Section "A" Crim. Dist. Judge* (1887) 39 La. Ann. 132, 1 So. 437 (similar purview); *Liberman v. State* (1889) 26 Neb. 464, 18 Am. St. Rep. 791, 42 N. W. 419 (prohibitory as to certain kinds of business); *Re Donnellan* (1908) 49 Wash. 460, 95 Pac. 1085 (theaters and other places of amusement).

In *Ex parte Koser* (1882) 60 Cal. 177, the court considered the validity of a Sunday law which is applicable to "any store, workshop, bar, saloon, banking house, or other place of business," and which is expressly declared not to be applicable to "hotels, boarding houses, barber shops, baths, markets, restaurants, taverns, livery stables, or retail drug stores, for the legitimate business of each, or such manufacturing establishments as are usually kept in continued operation." This enactment was sustained against the objections that it is special legislation, and that it is repugnant to the constitutional provisions which forbid the grant of "privileges or immunities," and require that all laws

ness.⁸ By two of the courts which have adopted this doctrine it has been declared that the addition to a statute of a proviso to the effect that one particular class of employment is not a work of necessity or charity, within the meaning of a general exceptive clause relating to such works, does not render the statute unlawfully discriminative.⁹ The rationale of other cases is that a statute which applies only to one occupation is invalid, as being in conflict with the provisions of state Constitutions which prohibit the passage of special laws.¹⁰

of a general nature shall have a uniform operation. A comparison of this case with the other California decisions cited in the following note seems to show that the supreme court of that state treats as valid a statute of a general tenor which exempts from its purview certain occupations, but refuses to uphold a statute which applies merely to a single occupation. Such a distinction can scarcely be regarded as satisfactory.

⁸ *Bode v. State* (1848) 7 Gill, 326 (sale of spirituous liquors); *People v. Bellet* (1894) 99 Mich. 151, 22 L.R.A. 696, 41 Am. St. Rep. 589, 57 N. W. 1094 (barbers); *People v. Havnor* (1896) 149 N. Y. 195, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541, affirming (1896) 1 App. Div. 459, 37 N. Y. Supp. 314 (barbers); *People ex rel. Hobach v. Kings County* (1895; Sup. Ct.) 13 Misc. 587, 35 N. Y. Supp. 19 (barbers); *Stanfeal v. State* (1908) 78 Ohio St. 24, 84 N. E. 419, 14 Ann. Cas. 138 (barbers); *Ex parte Northrup* (1902) 41 Or. 489, 69 Pac. 445 (barbers); *Bohl v. State* (1878) 3 Tex. App. 683 (sale or bartender); *State v. Sopher* (1903) 25 Utah, 318, 60 L.R.A. 468, 95 Am. St. Rep. 845, 71 Pac. 482 (barbers); *Stark v. Backus* (1909) 140 Wis. 557, 123 N. W. 98 (barbers).

This doctrine was laid down in *Breyer v. State* (1898) 102 Tenn. 103, 50 S. W. 769 (barbers), where the court did not refer to an earlier inconsistent case. *Ragio v. State* (1880) 86 Tenn. 272, 6 S. W. 401.

In *Ex parte Moynier* (1884) 65 Cal. 33, 2 Pac. 728, where one of the objections unsuccessfully made to the validity of a statute affecting only laundries was that it infringed the prohibition of the state Constitution against the abridgment of "privileges or immunities." But the California cases are in-

consistent. See preceding note, and note 10, *infra*.

For a case in which the same doctrine was applied with regard to a municipal ordinance, see *McClelland v. Denver* (1906) 36 Colo. 486, 86 Pac. 126, 10 Ann. Cas. 1014 (barbers).

⁹ *State v. Petit* (1898) 74 Minn. 376, 77 N. W. 225 (affirmed in (1900) 177 U. S. 164, 44 L. ed. 718; 20 Sup. Ct. Rep. 666); *Stark v. Backus* (1901) 140 Wis. 557, 123 N. W. 98. In both of these cases the proviso related to barber shops. In the former it was held that the act of keeping open such a shop on Sunday did not come within the scope of the general exceptive clause, because it was not a work of necessity. (See *Phillips v. Innes* (1837) 4 Clark & F. 234, 2 Shaw & M. 465, reversing (1835) 13 Sc. Sess. Cas. 1st series, 778). The conclusion arrived at was that the proviso was simply inserted *ex abundanti cantela*.

¹⁰ In *Ex parte Westerfield* (1881) 55 Cal. 550, 36 Am. Rep. 47, an enactment making it a misdemeanor "for any person engaged in the business of baking to engage, or permit others in his employ to engage, in the labor of baking for the purpose of sale, between the hours of 6 o'clock P. M. on Saturday and 6 o'clock P. M. on Sunday," etc., was pronounced void. The court said: "The employees are not to be punished. This is a special legislation. A certain class is selected. As well might it have said, if master carpenters or blacksmiths, or if attorneys having clerks, shall labor or permit employees to labor, they shall be deemed guilty of a misdemeanor and be punished; carpenters or blacksmiths, not master workmen, or attorneys without clerks, may labor at their will. The baking of bread is in itself lawful and necessary. Even if there be authority to restrain the labor on some one day,

In one case it was urged, but without success, that a proviso in the given statute to the effect that it should not apply to persons who conscientiously observed the seventh day of the week as the Sabbath rendered the statute repugnant to a prohibition against the granting

it must be, if at all, under a general law restraining labor on that day."

In *Ex parte Jentzsch* (1896) 112 Cal. 468, 32 L.R.A. 664, 44 Pac. 803, where an enactment declaring it a misdemeanor to keep open a barber shop, or work as a barber, on Sunday and other holidays, was annulled, the court observed: "It is not easy to see where or how this law protects labor from the unjust exactions of capital. A man's constitutional liberty means more than his personal freedom. It means, with many other rights, his right freely to labor, and to own the fruits of his toil. It is a curious law for the protection of labor which punishes the laborer for working. Yet that is precisely what this law does. The laboring barber, engaged in a most respectable, useful, and cleanly pursuit, is singled out from the thousands of his fellows in other employments, and told that, willy nilly, he shall not work upon holidays and Sundays after 12 o'clock noon. His wishes, tastes, or necessities are not consulted. If he labors, he is a criminal. Such protection to labor carried a little further would send him from the jail to the poorhouse. How comes it that the legislative eye was so keen to discern the needs of the oppressed barber, and yet was blind to his toiling brethren in other vocations? Steam car and street car operatives labor through long and weary Sunday hours; so do mill and factory hands. There is no Sunday period of rest and no protection for the overworked employees of our daily papers. Do these not need rest and protection? The bare suggestion of these considerations shows the injustice and inequality of this law. In brief, whether or not a general law to promote rest from labor in all business vocations may be upheld as within the due exercise of the police power as imposing for its welfare a needed period of repose upon the whole community, a law such as this certainly cannot. A law is not always general because it operates upon all within a class. There must be back of that a substantial reason why it is

made to operate only upon a class, and not generally upon all."

In *Armstrong v. State* (1908) 170 Ind. 188, 15 L.R.A.(N.S.) 646, 84 N.E. 3, where a statute declaring it to be a misdemeanor for barbers to ply their vocation on the Sabbath Day was pronounced void, the court said: "The act under consideration was not designed primarily to protect from fraud and oppression the class to which it relates or to safeguard the well-being of a class of laborers peculiarly oppressed, helpless, and dependent, but its chief object was to enforce the observance of Sunday as a day of rest. The validity of general laws to that end have been upheld by this court and by all other courts of the Union from colonial days to the present, and the propriety and necessity of such regulations for the physical and moral well-being of the people cannot be questioned. This statute attempts by special act to do what plainly could be, and for ninety years, had been, done by a general statute. The courts of some states have upheld legislative enactments relating to a particular class of laborers, upon the ground that their hours of labor were unusually long; and if we were confronted with a statute primarily to limit the hours of continuous service to which a laborer could be subjected or to relieve employees of burdens peculiar to the barber's vocation, and to which penalties were incidentally appended, a different question would be presented. But the act in question merely makes the desecration of the Sabbath by a barber a special crime, and to that affixes punishment different from that imposed upon others for like offenses, and clearly falls within the inhibition of § 22, article 4, of the Constitution of this state.

The class against which this act was directed was manifestly chosen arbitrarily and without substantial ground upon which to justify diversity of legislation. The business of barbering is cleanly in itself, and ordinarily conducted in a quiet and orderly way, and the suspension of such work on Sunday cannot be said to promote the

of "special privileges or immunities" to one class of citizens.¹¹ In other cases it has been held that the inclusion of such a proviso invalidates a statute¹² or a municipal ordinance.¹³

(4) That they are in conflict with the constitutional provisions which guarantee religious liberty and place all religions on an equal footing. This contention has been uniformly rejected even in cases where the statutes under consideration contained no specific exception in favor of sects who observed Saturday as the day of rest.¹⁴

health, comfort, safety, and welfare of society in general in any manner or to any degree other and different from the cessation of work in other ordinary vocations of life. It must follow, therefore, that this act is special legislation, is violative of the Constitution, and void."

The doctrine of the above cases was also applied in *Stratman v. Com.* (1910) 137 Ky. 500, 27 L.R.A.(N.S.) 949, 136 Am. St. Rep. 299, 125 S. W. 1094 (barbers); and in *State v. Graneman* (1896) 132 Mo. 326, 33 S. W. 784 (barbers).

In *Tacoma v. Krech* (1896) 15 Wash. 296, 34 L.R.A. 68, 46 Pac. 255, an ordinance of a city prohibiting barbers from pursuing their calling on Sunday for compensation was held to be invalid special legislation.

¹¹ *Johns v. State* (1887) 78 Ind. 332, 41 Am. Rep. 577. The court said: "All citizens accepting these terms may claim the immunity. All who observe the seventh day of the week are entitled to the immunity provided. There is nothing restricting any citizen from enjoying it upon the same terms with all his fellow citizens. The framers of the statute meant to leave it to the consciences and judgments of the citizens to choose between the first and seventh day of the week. One or the other of these days they must refrain from common labor. Which it shall be is to be determined by their own consciences. It was not the purpose of the lawmakers to compel any class of conscientious persons to abstain from labor upon two days of every week. Without the proviso which is said to break down the law, a large number of citizens would be compelled to lose two days of labor. One day, because of their conscientious convictions of religious duty, and one by the command of a municipal law. . . . A leading and controlling element of our system of government is that there shall be absolute freedom in

all matters of religious belief. The statute here under examination is framed in harmony with this all pervading and controlling principle. It was meant not to secure special privilege to any class, but to afford free opportunity to all to observe that day which, in their conscientious judgments, they believe to be that upon which good men should cease from labor."

¹² *Anonymous* (1882) 12 Abb. N. C. 455.

¹³ *Shreveport v. Levy* (1874) 26 La. Ann. 671, 21 Am. Rep. 553.

¹⁴ In *Specht v. Com.* (1848) 8 Pa. 312, 49 Am. Dec. 518, where the Seventh Day Baptists attacked the validity of the statute in question, the court said: "Though it may have been a motive with the lawmakers to prohibit the profanation of a day regarded by them as sacred,—and certainly there are expressions used in the statute that justify this conclusion,—it is not perceived how this fact can vitally affect the question at issue. All agree that to the well-being of society, periods of rest are absolutely necessary. To be productive of the required advantage, these periods must recur at stated intervals, so that the mass of which the community is composed may enjoy a respite from labor at the same time. They may be established by common consent, or, as is conceded, the legislative power of the state may, without impropriety, interfere to fix the time of their stated return and enforce obedience to the direction. When this happens, some one day must be selected, and it has been said the round of the week presents none which, being preferred, might not be regarded as favoring some one of the numerous religious sects into which mankind are divided. In a Christian community, where a very large majority of the people celebrate the first day of the week as their chosen period of rest from labor, it is not surprising that that day should have received the leg-

Still less are they open to objection when they do contain a proviso making such an exception.¹⁵

A comparison of the cases in which it has been held that Sunday laws are not repugnant to the "due process" and "equality" clauses of Constitutions, with the cases in which such repugnancy has been predicated in respect of many of the enactments discussed in the preceding subtitles, is suggestive of some doubts as to whether Sunday laws would have been so generally upheld as they have been against objections based on that repugnancy, if at the time when they were first impugned on this ground, the courts had not already been proceeding for a long period upon the assumption that they were valid. To the prepossessions resulting from this circumstance, rather than to the consideration adverted to in some cases, *viz.*, that enactments of this type are older than the Constitutions themselves,¹⁶ is possibly to be ascribed, in some measure at all events, the fact that they have apparently received a more favorable treatment than other statutes which have been regarded as interfering to an improper extent with freedom of contract or as being unduly discriminative.

What is, perhaps, another instance of the influence exercised upon the trend of judicial thought by that sort of prescriptive right to existence which an unquestioned recognition for a prolonged period confers upon statutes has been adverted to in the subtitle in which the validity of provisions allowing absolute liens for wages is discussed. See § 2817, *ad finem, ante*.

islative sanction; and as it is also devoted to religious observances, we are prepared to estimate the reason why the statute should speak of it as the Lord's Day, and denominate the infraction of its legalized rest a profanation. Yet this does not change the character of the enactment. It is still, essentially, but a civil regulation made for the government of man as a member of society, and obedience to it may properly be enforced by penal sanctions. To say that one of the objects of the legislature was to assert the sanctity of the particular day selected is to say nothing in proof of the unconstitutionality of the act, unless in this the religious conscience of others has been offended and their rights invaded."

See also *Frolickstein v. Mobile* (1867) 40 Ala. 728; *Shover v. State* (1850) 10 Ark. 259; *Scales v. State* (1886) 47 Ark. 476, 58 Am. Rep. 768, 1 S. W. 769; *Ex parte Burke* (1881) 59 Cal. 6, 43 Am. Rep. 231; *State ex rel. Walker v. Section "A" Crim. Dist. Judge* (1887) 39 La. Ann. 132, 1 So.

437; *Judefind v. State* (1894) 78 Md. 510, 22 L.R.A. 721, 28 Atl. 405; *Com. v. Has* (1877) 122 Mass. 40; *State v. Ambbs* (1854) 20 Mo. 214; *Neuendorff v. Duryea* (1877) 69 N. Y. 557, 25 Am. Rep. 235; *Lindenmuller v. People* (1861) 33 Barb. 548; *People v. Hoym* (1860) 20 How. Pr. 76; *Com. v. Wolf* (1817) 3 Serg. & R. 49; *Ex parte Sundstrom* (1888) 25 Tex. App. 133, 8 S. W. 207.

For a case in which the same position was taken with regard to a municipal ordinance, see *Charleston v. Benjamin* (1846) 2 Strobb. L. 508, 49 Am. Dec. 608.

¹⁵ *People v. Bellett* (1894) 99 Mich. 151, 22 L.R.A. 696, 41 Am. St. Rep. 589, 57 N. W. 1094; *State v. Ambbs* (1854) 20 Mo. 214.

In *Canton v. Nist* (1859) 9 Ohio St. 439, a municipal ordinance was held void on the ground that it did not in terms exempt from its scope persons covered by such a proviso.

¹⁶ See, for example, *Lindenmuller v. People* (1861) 33 Barb. 548.

L. GENERAL COMMENTS.

2281a. Introductory.—It would be unprofitable to undertake the task of tabulating and analyzing a body of authorities so discordant as the cases reviewed in the preceding subtitles. But it may be advisable to make a few general remarks upon some particular aspects of the constitutional principles applied by the courts in dealing with the enactments in question.

2281b. Constitutional provisions restrictive of the power of legislatures in respect of the enactment of labor laws.—The question whether a given enactment concerning employers and employees should be annulled, on the ground of its interfering unduly with the right of contract, involves a construction of the provisions which have been inserted in organic laws for the protection of person and property. The one most frequently invoked as a criterion of validity is that which is embodied in the clause of the Federal and state Constitutions, which declares that “no person shall be deprived of life, liberty, or property, without due process of law.” The theory entertained by the Supreme Court of the United States in regard to the effect of this clause, when considered with reference to legislation of the type now under discussion is indicated by the following passage: “The liberty mentioned in that Amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.” . . . “In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, must be embraced the right to make all proper contracts in relation thereto.”¹ Language of a similar tenor has often been used by state courts.²

¹ *Allgeyer v. Louisiana* (1897) 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427, quoted in *Williams v. Fears* (1900) 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128; *Chicago, B. & Q. R. Co. v. McGuire* (1911) 219 U. S. 549, 567, 55 L. ed. 328, 338, 31 Sup. Ct. Rep. 259.

In view of the fact that a large pro-

portion of the statute discussed in this chapter apply specifically to various descriptions of corporations, it may not be amiss to mention that a corporation is a “person” within the meaning of the “due process” and “equality” clauses of the 14th Amendment, *Missouri P. R. Co. v. Mackey* (1888) 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161;

In an opinion prepared in compliance with a request of the Massachusetts legislature, the supreme court of that state drew attention to some historical facts which are extremely important for the purposes of the present discussion. "In legal nomenclature, at the time

Gulf, C. & S. F. R. Co. v. Ellis (1897) 165 U. S. 150, 41 L. ed. 686, 17 Sup. Ct. Rep. 255; *Arkansas State Co. v. State* (1910) 94 Ark. 27, 27 L.R.A.(N.S.) 255, 140 Am. St. Rep. 103, 125 S. W. 1001; *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery* (1898) 152 Ind. 1, 69 L.R.A. 875, 71 Am. St. Rep. 301, 49 N. E. 582; *McGuire v. Chicago, B. & Q. R. Co.* (1906) 131 Iowa, 340, 33 L.R.A. (N.S.) 706, 108 N. W. 902; *Luman v. Hitchens Bros. Co.* (1890) 90 Md. 14, 46 L.R.A. 393, 44 Atl. 1051; *Kiley v. Chicago, M. & St. P. R. Co.* (1909) 138 Wis. 215, 119 N. W. 309, 120 N. W. 756, 21 Am. Neg. Rep. 394, but is not a "citizen" whose "privileges and immunities" are secured to citizens against state legislation. *Orient Ins. Co. v. Daggs* (1899) 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Chicago, R. I. & P. E. Co. v. State* (1908) 86 Ark. 412, 111 S. W. 456; *Pittsburgh, C. C. & St. L. R. Co. v. Lighthouse* (1906) 168 Ind. 438, 78 N. E. 1033; *Inland Steel Co. v. Yedinak* (1909) 172 Ind. 423, 433, 139 Am. St. Rep. 389, 87 N. E. 229.

The 5th Amendment to the Federal Constitution, which declares that no person shall be deprived of liberty or property without due process of law, operates exclusively in restriction of Federal power, and has no application to the state legislatures. *Thorington v. Montgomery* (1893) 147 U. S. 490, 37 L. ed. 252, 13 Sup. Ct. Rep. 394; *Capital City Dairy Co. v. Ohio* (1902) 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120; *Inland Steel Co. v. Yedinak* (1909) 172 Ind. 423, 433, 139 Am. St. Rep. 389, 87 N. E. 229; *Pittsburgh, C. C. & St. L. R. Co. v. Lighthouse* (1906) 168 Ind. 438, 78 N. E. 1033.

² "The right of property, preserved by the Constitution, is the right not only to possess and enjoy it, but also to acquire it in any lawful mode, or by following any lawful industrial pursuit which the citizen, in the exercise of the liberty guaranteed, may choose to adopt. Labor is the primary foundation of all wealth. The property which each one has in his own labor is

the common heritage, and, as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guaranty." *Braceville Coal Co. v. People* (1893) 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62.

"The privilege of contracting is both a liberty and property right. *Fraser v. People*, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395. . . . The right to use, buy, and sell property, and contract in respect thereto, is protected by the Constitution. Labor is property, and the laborer has the same right to sell his labor and contract with reference thereto as has any other property owner." *Ritchie v. People* (1895) 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454.

"The rights of life, liberty, and property embrace whatever is necessary to secure and effectuate the enjoyment of those rights. The rights of liberty and of property include the rights to acquire property by labor and by contract." *Gillespie v. People* (1900) 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007, quoted in *Josma v. Western Steel Car & Foundry Co.* (1911) 249 Ill. 508, 514, 94 N. E. 945.

"The right to labor for and to render services to another, and the right to dispose of the compensation to be received for so doing, are property rights." *Massie v. Cessna* (1909) 239 Ill. 352, 358, 359, 28 L.R.A.(N.S.) 1108, 130 Am. St. Rep. 234, 88 N. E. 152.

"The right to a sustenance and to acquire property, and to make treaties in relation thereto, is liberty, in the constitutional sense. Labor is property. It is exchangeable for food and raiment and comforts, and may be bought and sold, and contracts made in relation thereto, the same as concerning any other property." *Republic Iron & Steel Co. v. State* (1903) 160 Ind. 379, 62 L.R.A. 136, 66 N. E. 1005.

"Liberty includes the right to ac-

of the adoption of the Constitution of Massachusetts, the right to make a contract for personal services, if it can be regarded either as property or as a liberty or privilege, would perhaps have been regarded as the latter. So far as we are aware, the capacity to make such

quire property, and that means and includes the right to make and enforce contracts." *State v. Loomis* (1893) 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350.

The right to labor, or employ labor, and make contracts relative thereto, is "both a liberty and a property right." *State v. Missouri Tie & Timber Co.* (1904) 181 Mo. 536, 65 L.R.A. 588, 103 Am. St. Rep. 614, 80 S. W. 933, 2 Ann. Cas. 119.

"Liberty, in its broad sense, as understood in this country, means the right not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (except as such laws may be passed in the exercise by the legislature of the police power), . . . are infringements upon his fundamental rights of liberty, which are under constitutional protection." *Re Jacobs* (1885) 98 N. Y. 98, 50 Am. Rep. 636, quoted in *Ives v. South Buffalo R. Co.* (1911) 201 N. Y. 271, 292, 293, 34 L.R.A.(N.S.) 162, 94 N. E. 431, Ann. Cas. 1912 B, 156, 1 N. C. C. A. 517.

"The provisions of the state and of the Federal Constitutions protect every citizen in the right to pursue any lawful employment in a lawful manner. He enjoys the utmost freedom to follow his chosen pursuit, and any arbitrary distinction against, or deprivation of, that freedom by the legislature is an invasion of the constitutional guaranty." *People v. Williams* (1907) 189 N. Y. 131, 12 L.R.A.(N.S.) 1130, 121 Am. St. Rep. 854, 87 N. E. 778, 12 Ann. Cas. 798.

"The right to follow any lawful pursuit is one of the inalienable rights of a citizen of the United States, and a law which prevents or hinders a man

from going into partnership with another for the purpose of carrying on the trade, business, or calling of employing or master plumbers, infringes his natural rights as secured by the Constitution. There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his house, or restrain his otherwise lawful movements, are infringements upon his fundamental rights of liberty, which are under constitutional protection. The common business and callings of life, the ordinary trades and pursuits which are innocent in themselves and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same terms. The liberty of pursuit, the right to follow any of the ordinary callings of life, is one of the privileges of a citizen of the United States. These propositions are taken from some of the numerous cases on the subject, and they are now so familiar that it is scarcely necessary to cite the cases where they may be found." *Schnaier v. Navarre Hotel & Importation Co.* (1905) 182 N. Y. 83, 88, 70 L.R.A. 722, 108 Am. St. Rep. 790, 74 N. E. 561.

The conception that the right to labor is property may possibly have been derived from the passage in *Smith's Wealth of Nations*, where it is remarked that "the property which every man has in his own labor, as it is the original foundation of all property, so it is the most sacred and inviolable." (Cited in *Austin, Jur.* p. 8, without any precise reference").

By English jurists it is fully recognized that the right to labor is one of those entitled to the protection of the laws; but apparently they do not regard it as being actually property.

"Every person has a right under the

a contract was not, in the discussions concerning the Constitution, ever spoken of as property, although that capacity may be necessary to the acquisition of property. . . . In Massachusetts, after the province became an independent state, and before the adoption of the Constitution, the general court passed laws regulating minutely the prices of commodities, and, in certain respects, the prices of labor.”³ The conclusion suggested by the circumstances thus adverted to is sufficiently obvious. If the provisions inserted in the Massachusetts Constitution were not intended to impose any restrictions on the power which the legislature had previously exercised with respect to the regulation of the contract of employment, that power must have remained unchanged after the Constitution came into force, except in so far as a narrowing of its scope was inferable, necessarily or by reasonable implication, from the language of the general provisions designed for the protection of person and property. But it seems impossible to contend that they contain any phraseology which imperatively requires such an inference. So far, therefore, as they were concerned, the Constitution left the legislature still competent to pass any labor laws which did not overstep the line which separates mere regulation from confiscation.

There seems to be a similar lack of specific evidence appropriate to show that the “due process” clause of the Federal Constitution was consciously aimed at any description of legislation regarding the contract of employment, except such as was distinctly confiscatory in its nature. But as the meaning of the clause has, in point of fact, been determined without any reference to this circumstance, and in a sense which has led to the invalidation of many enactments which cannot

law, as between himself and his fellow subjects, to full freedom in disposing of his own labor or his own capital according to his will. It follows that every other person is subject to the corresponding duty arising therefrom, and is prohibited from any obstruction to the fullest extent of this right, which can be made compatible with the exercise of similar rights by others.” Sir W. Erle, *Trade Unions*, p. 12.

“The liberty of a man’s mind and will, to say how he should bestow himself and his means, his talents and his industry, is as much a subject of the law’s protection as is that of his body.” Bramwell, B., in *Reg v. Druitt* (1867) 10 Cox, C. C. 592, 600.

It should be observed moreover, that even in the American states the right to labor is not regarded as being “property” for all purposes. It has been held not to be within the connotation of that term, as used in a provision declaring that fear such as will constitute extortion may be induced by a threat to do an unlawful injury to the person or property of the individual threatened. *Re McCabe* (1903) 29 Mont. 28, 73 Pac. 1106. The court expressed the opinion that certain constitutional cases cited by counsel were not relevant authorities.

³ *The House Bill* (1895) 163 Mass. 589, 28 L.R.A. 344, 40 N. E. 713.

reasonably be described as confiscatory, this phase of the subject is of merely academic interest.

2881c. Conflicting theories regarding the power of states to regulate the contract of service.—In some of the cases involving the constitutionality of enactments of the description discussed in the present chapter, it has been laid down broadly that all restrictions on the right of contract are beyond the scope of legislative power.¹ But, so far as the majority of jurisdictions are concerned, the accepted doctrine is that which is embodied in the following statement of the Federal Supreme Court: "While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts."² So far as regards the contract of employment this doctrine is sustained by all the cases in which the validity of the enactments

¹In *Godcharles v. Wigeman* (1886) 113 Pa. 431, 6 Atl. 354, the validity of a statute which declared that all orders given by manufacturers to their workmen, payable in goods or anything other than money, should be void, and prohibited the use of such orders in the payment of wages by manufacturers to their employees, was denied, on the ground that it "was an attempt on the part of the legislature to do what in this country cannot be done; that is, to prevent persons *sui juris* from making their own contracts."

"In this country the legislature has no power to prevent persons who are *sui juris* from making their own contracts; nor can it interfere with the freedom of contract between the workman and the employer." *Ritchie v. People* (1896) 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454, citing the above case.

Similar language was used in *State v. Goodwill* (1893) 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285.

²*Frisbie v. United States* (1895) 157 U. S. 160, 39 L. ed. 657, 15 Sup. Ct. Rep. 586. This statement was quoted in *Patterson v. The Eudora* (1903) 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821.

"There is no doubt that that freedom may be limited where there are visible reasons of public policy for the limita-

tion." *Minnesota Iron Co. v. Kline* (1905) 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159, 19 Am. Neg. Rep. 625 citing *Holden v. Hardy* (1897) 169 U. S. 366, 391, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383.

"It is, then, the established doctrine of this court that the liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the government in the exercise of its power to protect the safety, health, and welfare of the people." *McLean v. Arkansas* (1908) 211 U. S. 539, 547, 53 L. ed. 315, 319, 29 Sup. Ct. Rep. 206.

"It is undoubtedly true, as more than once declared by this court, that the general right to contract in relation to one's business is part of the liberty of the individual, protected by the 14th Amendment to the Federal Constitution; yet it is equally well settled that this liberty is not absolute and extending to all contracts, and that a state may, without conflicting with the provisions of the 14th Amendment, restrict in many respects the individual's power to contract." *Muller v. Oregon* (1907) 208 U. S. 412, 421, 52 L. ed. 551, 555, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957, quoted in *People ex rel. Williams Engineering & Contracting Co. v. Metz* (1908) 193 N. Y. 148, 164, 24 L.R.A.(N.S.) 201, 85 N. E. 1070.

"But it was recognized in the cases

discussed in the foregoing sections has been affirmed. Some of those cases, it should be remarked, were decided before the earliest of those in which the theory of the absolute liberty of contract was enunciated.³ It is obvious, moreover, that that theory has been expressly or impliedly repudiated in those numerous instances in which the courts have affirmed or taken for granted the validity of other classes of restrictive enactments.⁴

The preponderance of authority against such a theory is in fact so

cited, as in many others, that Freedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one wills, or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." *Chicago, B. & Q. R. Co. v. McGuire* (1911) 219 U. S. 549, 567, 55 L. ed. 328, 338, 31 Sup. Ct. Rep. 259.

"The liberty and right" [guaranteed by the 14th Amendment] "embraces the right to make contracts for the purchase of the labor of others, and equally the right to make contracts for the sale of one's own labor." *Adair v. United States* (1908) 208 U. S. 161, 172, 52 L. ed. 436, 441, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764.

"It is the established doctrine of the law that the liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the government in the exercise of its power to promote the safety, health, and welfare of the people." *Arkansas State Co. v. State* (1910) 94 Ark. 27, 27 L.R.A.(N.S.) 255, 125 S. W. 1001.

There is no such thing as absolute liberty of contract. Indeed, all personal and property rights are subject to proper legislative regulation and control. Every man surrenders a part of his liberty for the benefit and enjoyment of organized society. No one may do absolutely as he pleases. A very great proportion of our legislation is a restriction on some one's liberty. Indeed, the liberty of which we boast and are so justly proud is liberty under

laws, and not absolute license. It is freedom frequently restrained by law for the common good. *Mumford v. Chicago, R. I. & P. R. Co.* (1905) 128 Iowa, 685, 104 N. W. 1135.

"Regulation in reason is not a denial of due process of law, and this may be true either as to special occupations or as to general classes of business." *Knight & J. Co. v. Miller* (1909) 172 Ind. 27, 43, 87 N. E. 823, 18 Ann. Cas. 1146.

³ In *Branin v. Connecticut & P. River R. Co.* (1858) 31 Vt. 214, a provision rendering railroad companies liable for the wages of contractors' laborers was held to be a valid exercise of the police power. See § 2881d, *post*.

In *Peters v. St. Louis & I. M. R. Co.* (1856) 23 Mo. 107, and *Grannahan v. Hannibal & St. J. R. Co.* (1860) 30 Mo. 546, a similar enactment was sustained against the objection that it operated as a confiscation of property.

In the following cases mechanics' lien laws of the usual scope were pronounced or assumed to be valid. *Bohn v. McCarthy* (1881) 29 Minn. 23, 11 N. W. 127; *Hunter v. Truckee Lodge, No. 14, I. O. O. F.* (1879) 14 Nev. 24; *Jonkey v. Cook* (1880) 15 Nev. 58; *Blauvelt v. Woodworth* (1865) 31 N. Y. 285; *Glacins v. Black* (1876) 67 N. Y. 563.

⁴ The government "may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessities of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally

overwhelming that a commentator is fully justified in asserting that its interest at the present time lies mainly in the circumstance that it merely reflects in a somewhat extreme form one of the phases of opinion by which the evolution of the department of constitutional

speaking, every citizen has a right freely to contract for the price of his labor, services, or property." *Frisbie v. United States* (1895) 157 U. S. 160, 39 L. ed. 657, 15 Sup. Ct. Rep. 586.

"There never has been at any time in Massachusetts an absolute right in its inhabitants to make all such contracts as they pleased. Some contracts have always been held void at common law, and some contracts valid at common law have been declared void by statute. Married women at common law were under a general disability to make contracts during coverture; and although they have been recently empowered by the statutes to make contracts as if they were unmarried, still, at the present time husband and wife cannot make contracts with each other, and if the statutes were repealed, the powers of married women to make contracts would be governed by the common law. Marriage, brokerage, and post-obit bonds and covenants in restraint of trade sometimes have been held void. Minors at common law are under a disability to make contracts except for necessities, and this is said to be for their protection. Our statute of frauds prevents the enforcement in the courts of many kinds of contracts, unless they are shown by a writing, and prohibits the making of certain contracts, and this statute was passed for the protection of persons against fraud and perjury. Seamen sometimes have been regarded as a class of persons who could not be trusted to make their own contracts without supervision, and statutes have been passed making regulations concerning their wages and shipping contracts. U. S. Rev. Stat. tit. 53. Wages to a certain amount due for personal labor and services have been exempt from attachment, probably on the ground that it was thought that workmen generally need their wages for their support. Usury laws furnish perhaps the best known illustration of the regulation by statute of the price to be paid for the use of a commodity, but the validity of these laws usually has been regarded as an exception to

the general rule. Mass. Rev. Stat. tit. 12, entitled "Of the Regulation of Trade in Certain Cases," show various forms of interference by the legislature with what may be called the freedom of trade or of contracts concerning the sale of commodities. The regulation of the subject of fire insurance, and the prohibition of the sale of oleomargarine made in imitation of yellow butter, and the requirement that an agreement to make a will must be in writing, are some of the most recent instances in Massachusetts of the prohibition or regulation of contracts by statute. The constitutionality of much of this legislation never has been questioned, and, when questioned, it generally has been sustained. . . . It is manifest, however, from the examples we have given, that the regulation of contracts by statute, not amounting to a determination of rates or prices, has not been confined to public employments, or to business which may be said to be affected with a distinct public interest. The legislation on this subject relates to a great variety of contracts, and has been passed, some of it to promote the public health or the public morals or the public convenience, some of it for the protection of individuals against fraud, and some of it for the protection of classes of individuals against unfair or unconscionable dealing." *Re House Bill* (1895) 163 Mass. 589, 28 L.R.A. 344, 40 N. E. 713.

"Certain contracts are required to be in writing, manifestly to promote public morals by removing the temptation to perpetrate frauds by perjury. A householder is disqualified from withdrawing in advance from those dependent upon him the benefits of the exemption laws, and thus prevented from imposing upon the public the burden of their sustenance. Statutes limiting the rate of interest are valid, as preventing unconscionable extortion; and so on through a long list that might be given, each showing a logical and an appropriate relation to the promotion or protection of some interest of society." *Republic Iron & Steel Co. v. State*

law with which we are here concerned has been determined. It was a significant indication of the idea which, at the period when it was propounded, were exercising an influence upon the minds of many of the judges.⁵ Those ideas, it is plain, were largely the outcome of economic predilections, which disposed them to regard with suspicion and dislike every kind of "paternal legislation." Holding such legislation to be inexpedient, they were naturally impelled more or less strongly to give effect to their views by treating it as being also inconsistent with the conception of the liberty which is protected by organic laws. Except upon the hypothesis that the doctrine of *laissez faire* is to be deemed so far a part of constitutional jurisprudence that any enactment which conflicts with it is *prima facie* objectionable, it is difficult to account for the stress laid by various courts upon the fact that a restrictive statute is not only injurious to the community as a whole,⁶ but is also "an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his

(1903) 160 Ind. 379, 62 L.R.A. 136, 66 N. E. 1005.

"It is fundamental that the legislature may declare what persons are competent to enter into a contract. Thus, persons under disability cannot enter into a binding contract. Contracts cannot be made in restraint of trade, and contracts against public policy are void. The statute of frauds enables contracting parties to avoid contracts not in writing; a party will not be allowed to contract to waive the benefit of homestead or exemptions; and a married man cannot convey his homestead without his wife joining in the execution of the conveyance. These instances, and many others that might be mentioned, show that the law-making power of the state does have authority over the right to contract." *Arkansas Slave Co. v. State* (1910) 94 Ark. 27, 27 L.R.A. (N.S.) 255, 140 Am. St. Rep. 103, 125 S. W. 1001.

⁵ It may be pointed out that in the year preceding the one in which the above cited Pennsylvania case was decided, the New York court of appeals had, in *Re Jacobs* (1885) 98 N. Y. 98, 50 Am. Rep. 636, rendered its well-known decision annulling "An Act to Improve the Public Health, by Prohibiting the Manufacture of Cigars and Preparation of Tobacco in Any Form in Tenement Houses, in Certain Cases," etc. (N. Y. Laws 1884, chap. 272). The

circumstance that the statute under review purported to regulate a particular kind of industry naturally led the court to discuss its validity with reference to considerations of the same sort as would have been deemed relevant, if it had been specifically concerned with the contract of service. In fact the decision has been frequently cited in cases belonging to the category with which the present chapter deals. See, for example, *Lochner v. New York* (1905) 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133.

⁶ "Such legislation [*i. e.*, police regulations] may invade one class of rights to-day and another to-morrow, and if it can be sanctioned under the Constitution, while far removed in time we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed, and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions. Such governmental interferences disturb the normal adjustments of the social fabric, and usually derange the delicate and complicated

manhood, but subversive of his rights as a citizen of the United States." ⁷

By the earlier cases decided from this point of view a strong set in a direction unfavorable to the upholding of labor laws was given to the current of judicial authority just at the critical time when such laws were beginning to engage the attention of the public. Within a few years there was created a body of precedents which, although the courts responsible for them would of course have disavowed any intention of running counter to the familiar rule, "that legislative enactments should be recognized and enforced by the court as embodying the will of the people, unless they are plainly and palpably beyond all question in violation of the fundamental law of the Constitution," ⁸ seem to have gone very far towards a virtual nullification of that rule with respect to statutes of the kind with which we are now concerned. But the influence of the school of thought which is in favor of allowing a larger scope of action to the legislatures has been

machinery of industry, and cause a score of ills while attempting the removal of one." Such language was more appropriate to a treatise on political economy than to the opinion of a court.

⁷ This statement has been quoted or paraphrased by other courts which have followed the lead of that of Pennsylvania.

In *State v. Fire Creek Coal & Coke Co.* (1889) 33 W. Va. 188, 6 L.R.A. 359, 25 Am. St. Rep. 891, 10 S. E. 288, the court said with regard to a statute requiring that order for wages should be paid in lawful money: "The ground on which the truck act is condemned is that it is class legislation, and an unjust interference with the rights, privileges, and property of both the employer and the employee, and places upon both the badge of slavery, by denying to the one the right of managing his own private business, and assuming that the other has so little capacity and manhood as to be unable to protect himself, or manage his own private affairs.

In *State v. Goodwill* (1898) 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285, the court said, with regard to a similar enactment: "In view of what the courts have uniformly held in respect to this class of legislation, it is needless to prolong this discussion. It is a species of sumptuary legislation

which has been universally condemned as an attempt to degrade the intelligence, virtue, and manhood of the American laborer, and foist upon the people a paternal government of the most objectionable character, because it assumes that the employer is a knave, and the laborer an imbecile."

That another act of this description made laborers the "wards of the state," and that "persons *sui juris* need no guardians," was remarked in *State v. Hawn* (1899) 61 Kan. 146, 47 L.R.A. 369, 59 Pac. 340.

"The workingman of intelligence is treated as an imbecile." *Johnson v. Goodyear Min. Co.* (1899) 127 Cal. 4, 47 L.R.A. 338, 78 Am. St. Rep. 17, 59 Pac. 304.

In *Republic Iron & Steel Co. v. State* (1903) 160 Ind. 379, 62 L.R.A. 136, 66 N. E. 1005, it was observed with regard to a statute which prescribed that wages should be paid at certain intervals: "The statute places the wage earners of the state under quasi guardianship. It classes them with minors and other persons under legal disability by making their contracts void at the pleasure of a public officer. It tends to degrade them as citizens by impeaching their ability to take care of themselves. It is paternalism, pure and simple and in violent conflict with the liberty and equality theory of our institutions."

growing constantly during the subsequent period. Less and less importance is attached to the notion so strongly relied upon in the earlier cases, that labor legislation "is an offensive imputation upon the manhood and independence of the laborer, to assume that he needs the special guardianship and protection of the law."⁹ Indeed, it is not a little remarkable that any court should ever have seriously propounded the notion that any legislation could be "insulting" to the very classes at whose request it was passed. But the circumstance that such an objection has been so often relied upon is in itself a significant indication of the extent to which the conceptions of political economy have colored the views of many judges.

That the stricter theory as to the limits of legislative power has still numerous supporters will be readily conceded by anyone who peruses the foregoing subtitles. The unwillingness of several courts to concede the validity of enactments regarding the recovery of wages is a noteworthy illustration of the extent to which that theory still prevails.¹⁰ Of its vitality the Federal Supreme Court has furnished another remarkable proof in the decision by which an eight-hour law in regard to bakeries was annulled.¹¹ But the weight of that decision, viewed as a contribution to the jurisprudence of the subject, is greatly diminished by the fact that four members of the court refused to concur in it, and that among these dissentients were Justices Harlan and Holmes. It is certainly permissible to feel some doubts as to the soundness of a ruling disapproved by two judges of their eminence, and impugned by the powerful arguments by which their disapproval

⁸ *Atkin v. Kansas* (1903) 191 U. S. 207, 223, 48 L. ed. 148, 158, 24 Sup. Ct. Rep. 124.

⁹ As was aptly observed in the case from which this phraseology is quoted (*McGuire v. Chicago, B. & Q. R. Co.* (1906) 131 Iowa, 340, 33 L.R.A. 706, 108 N. W. 902): "This easy method of argument would wipe out most of our statutes. Generally speaking, all law is made to protect man against undue advantage at the hands of other men, and the chief justification for legislation upon matters of personal and property right is the fact that men do not and cannot always deal on equal footing. Under no circumstances is this inequality more frequent than in the relations between employer and employee under modern conditions. Indeed, in this inequality of advantage is found the only justification for any of

the many labor laws to which we have referred. This condition, as affording sufficient basis for the exercise of police regulation, has often been recognized by the courts."

¹⁰ See especially the Illinois cases cited in §§ 2821, 2824, *ante*.

¹¹ *Lochner v. New York* (1905) 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133. Those who like to trace the effects which have often been produced upon the development of case law by the views of individual judges will be interested in observing that the opinion of the majority of the court was prepared by Mr. Justice Peckham, who, about twenty years previously, had, as a member of the New York court of appeals, propounded his *laissez faire* theories in the *Jacobs Case* already referred to. See note 5, *supra*.

was sustained. An additional warrant for such doubts is supplied by the consideration that, in its broader aspects the case seems to be scarcely consistent with two others previously decided by the same court.¹² It may, after all, prove to have been the result of a merely temporary retrogression towards the narrower doctrine regarding the limits of legislative power. Unquestionably the trend of modern thought with respect to social development is towards a more or less complete rejection of the economic ideas which are reflected in the prevailing opinion. It seems not improbable, therefore, that this court may ultimately accord a full recognition to the principle embodied in the remark of Mr. Justice Holmes, *viz.*, that "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*." The acceptance of such a principle by the tribunal whose authority with respect to matters of constitutional law is paramount would manifestly render obsolete a large part of the decisions of the state courts.

2881d. Limits of the police power with regard to such regulations.—

The validity of a labor law, in so far as it involves merely the scope of legislative authority in respect of the regulation of the rights and duties of employers and employees, like the validity of other statutes, depends upon the question whether it was directed to the attainment of one of the objects in regard to which the police power may be exercised. "Neither the 14th Amendment,—broad and comprehensive as it is—nor any other Amendment, was designed to interfere with the police of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity."¹ The following statement may also be quoted: "The right 'of acquiring, possessing, and protecting property,' and the right to the enjoyment of 'life, liberty, and property,' are secured to every citizen by the Constitution of Massachusetts, as

¹² *Holden v. Hardy* (1898) 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, and *Knoxville Iron Co. v. Harbison* (1901) 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1. It was, of course, an easy matter for Justice Peckham to distinguish these earlier cases on grounds which enabled him to take the position that they were not really precedents adverse to the view for which he was contending. But he did

not make any attempt to grapple with the wider question whether those cases were not in effect representing an essentially different theory regarding the extent of legislative powers in regard to the regulation of the contract of service. This omission is one of the most unsatisfactory features of his opinion.

¹ *Barbier v. Connolly* (1885) 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

well as by the Constitution of the United States. These rights include the right to use one's powers and faculties in any reasonable way for the promotion of his interests, and the right to make contracts with others. These rights can be regulated by the legislature, in the exercise of the police power, only in the interest of the public health, the public safety, or the public morals, and, in a certain restricted sense, of the public welfare."²

a. Health and safety.—It is fully settled that statutes which are designed to conserve the health or safety of employees fall within the domain of the police power.³ "The fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere, where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer."⁴

On the ground thus indicated it has been held that the legislatures are authorized to enact the provisions commonly inserted in factory acts with respect to the guarding of dangerous machinery, the construction of fire escapes and ventilating appliances, the provision of toilet facilities, pure drinking water and sanitary arrangements, and so forth;⁵ provisions requiring street railway companies to furnish employees with shelter while they are operating cars in inclement

² *Re Opinion of Justices* (1911) 208 Mass. 619, 34 L.R.A.(N.S.) 771, 94 N. E. 1044.

For other cases in which the public "welfare" has been referred to as one of the objects which justify labor legislation, see *W. C. Ritchie & Co. v. Wayman* (1910) 244 Ill. 509, 27 L.R.A.(N.S.) 994, 91 N. E. 695; *Mutual Loan Co. v. Martell* (1909) 200 Mass. 482, — L.R.A.(N.S.) —, 128 Am. St. Rep. 446, 86 N. E. 916; *Shohoney v. Quincy*, *O. & K. C. R. Co.* (1910) 231 Mo. 131, 132 S. W. 1059, Ann. Cas. 1912A, 1143; *Re Ten-Hour Law* (1902) 24 R. I. 603, 61 L.R.A. 612, 54 Atl. 602.

The term "comfort" is sometimes added to the list of those objects. See, for example, *Knoxville Iron Co. v. Harbison* (1901) 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; *Re Jacobs* (1885) 98 N. Y. 98, 109, 50 Am. Rep. 636.

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³ "That the legislature has the power to make all needful regulations in the conduct and management of a business which is attended by danger to health or safety to the employees is no longer an open question." *State v. Cantwell* (1903) 179 Mo. 245, 78 S. W. 569.

⁴ *Holden v. Hardy* (1898) 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

⁵ These allowable subjects of legislation are enumerated in *Ives v. South Buffalo R. Co.* (1911) 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517.

See also *Schaezlein v. Cabaniss* (1902) 135 Cal. 466, 56 L.R.A. 733, 87 Am. St. Rep. 122, 67 Pac. 755; *Casper v. Lewin* (1910) 82 Kan. 604, — L.R.A.(N.S.) —, 109 Pac. 657; *State v. Vickers* (1904) 186 Mo. 103, 84 S. W. 908, 2 Ann. Cas. 779.

weather;⁶ provisions by which the hours of labor in certain occupations are limited in respect either of employees generally,⁷ or of women,⁸ or of minors;⁹ provisions which impose upon operators of mines various duties which relate to the furnishing of a reasonably safe place for workmen;¹⁰ and provisions requiring operators of mines to furnish certain medical appliances for the use of injured workmen.¹¹

b. Morals.—The exercise of the police power in the interest of morality is illustrated, with respect to labor legislation, by the cases which have affirmed the validity of statutes designed to prevent fraud and oppression.¹² On this ground the courts have upheld enactments designed to secure the payment of wages in lawful money;¹³ enactments regulating the computation of wages in mines when the work-

⁶ *State v. Smith* (1874) 58 Minn. 35, 25 L.R.A. 759, 59 N. W. 545; *State v. Whitaker* (1907) 160 Mo. 59, 60 S. W. 1068; *Beaumont Traction Co. v. State* (1909) — Tex. Civ. App. —, 122 S. W. 615, 618.

⁷ For cases relating to mining work, see *Holden v. Hardy* (1895) 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Re Martin* (1910) 157 Cal. 59, 26 L.R.A.(N.S.) 242, 106 Pac. 235; *State v. Cantwell* (1904) 179 Mo. 245, 78 S. W. 569; *State v. Livingston Concrete Bldg. & Mfg. Co.* (1906) 34 Mont. 570, 87 Pac. 980, 9 Ann. Cas. 204; *Ex parte Hair* (1905) 28 Nev. 425, 82 Pac. 453, 6 Ann. Cas. 897; *Ex parte Boyce* (1904) 27 Nev. 299, 65 L.R.A. 47, 75 Pac. 1, 1 Ann. Cas. 66.

For a case relating to the operation of street railways, see *Re Ten-Hour Law* (1907) 24 R. I. 603, 61 L.R.A. 612, 54 Atl. 602.

⁸ *Muller v. Oregon* (1908) 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; *Com. v. Hamilton Mfg. Co.* (1876) 120 Mass. 383; *W. C. Ritchie & Co. v. Wayman* (1910) 244 Ill. 509, 27 L.R.A.(N.S.) 994, 91 N. E. 695; *People v. Bowes-Allegretti Co.* (1910) 244 Ill. 557, 91 N. E. 701.

⁹ *Inland Steel Co. v. Yedinak* (1909) 172 Ind. 423, 139 Am. St. Rep. 389, 87 N. E. 229.

¹⁰ *Inspection. Consolidated Coal Co. v. Illinois* (1902), 185 U. S. 207, 46 L. ed. 875, 22 Sup. Ct. Rep. 616, affirming (1900) 186 Ill. 134, 56 L.R.A. 266, 57 N. E. 880; *Chicago, W. & V. Coal Co. v. People* (1899) 181 Ill. 270, 48 L.R.A. 554, 54 N. E. 961; *Wilmington Star*

Min. Co. v. Fulton (1906) 205 U. S. 60, 73, 51 L. ed. 708, 715, 27 Sup. Ct. Rep. 512 (liability imposed for failure of mine manager to comply with requirements of statute).

Map of workings. Daniels v. Hilgard (1875) 77 Ill. 640, 15 Mor. Min. Rep. 280.

Employment of special shot firers to attend to the blasting work. *State v. Murlin* (1896) 137 Mo. 297, 38 S. W. 923.

¹¹ *Wolf v. Smith* (1906) 149 Ala. 457 (Syll.) 9 L.R.A.(N.S.) 338, 42 So. 824. Second appeal (—) 160 Ala. 644, 49 So. 395.

¹² In *State v. Haun* (1899) 61 Kan. 146, 47 L.R.A. 369, 59 Pac. 340, it was laid down that "there can be no constitutional interference by the state in the private relation of master and servant, except for the purpose of preventing frauds and trespasses," quoting Tiedeman on Limitations of the Police Power, § 178. But this broad exclusive statement manifestly needs some qualification.

¹³ *State v. Peel Splint Coal Co.* (1862) 36 W. Va. 802, 17 L.R.A. 385, 15 S. E. 1000 (decision by equally divided court); *Re Scrip Bill* (1897) 23 Colo. 504, 48 Pac. 512; *Avent Beattyville Coal Co. v. Com.* (1894) 96 Ky. 218, 28 L.R.A. 273, 28 S. W. 502.

In *Knobville Iron Co. v. Harbison* (1901) 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1, a statute of this tenor was upheld on the ground that its tendency was "to place the employer and employee upon equal ground in the matter of wages."

men are paid by weight;¹⁴ enactments forbidding the assignment of wages to become due in the future;¹⁵ and enactments regulating employment agencies.¹⁶

c. Welfare.—This expression is clearly broad enough to connote the categories of enactments which are noticed in the preceding subsections. Any legislation which is calculated to promote the health, safety, or good morals of certain members of the community and does not unduly interfere with rights of other members, must necessarily enure to the advantage of the community, as a whole.¹⁷ But for the purpose of a precise differentiation the expression may be regarded as embracing all those labor laws which are not assignable to the other heads. The enactments which belong to the residuary class constitute the great majority of those which have been either held or assumed to be a valid exercise of the police power. They deal with the matters enumerated below; but it should be observed that in many of the cases reviewed in the sections mentioned the validity of the statutes under discussion was actually determined with relation, not to the scope of the police power, but to the propriety of the classification on some other point.

(1) Special privileges in respect of the recovery of wages. See §§ 2813–2819, *ante*.

(2) The footing on which wages shall be computed. See § 2821, *ante*.

(3) The payment of wages at certain intervals, or at the time when the relationship of master and servant is terminated. See §§ 2824 and 2826, *ante*.

(4) The exemption of wages from attachment for debts. See § 2825, *ante*.

(5) Wrongful departure from service. See §§ 2832 *et seq.*, *ante*.

(6) The liability of a master for injuries sustained by his servants in the course of their employment. See §§ 2840–2854, *ante*.

(7) The special interests of organized labor. See §§ 2860–2863, *ante*.

¹⁴ *State v. Peel Splint Coal Co.* (N.S.) 859, 76 N. E. 11, 5 Ann. Cas. (1892) 36 W. Va. 802, 17 L.R.A. 385, 325.
¹⁵ S. E. 1000 (decision by equally divided court).

¹⁶ *International Text Book Co. v. Weissinger* (1902) 160 Ind. 349, 65 L.R.A. 599, 98 Am. St. Rep. 334, 65 N. E. 521; *Chicago & E. R. Co. v. Ebersole* (1909) — Ind. —, 87 N. E. 1090.

¹⁷ *People ex rel. Armstrong v. Ward* (1905) 183 N. Y. 223, 2 L.R.A.

¹⁷ “The state still retains an interest in his [the servant’s] welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer.” *Holden v. Hardy* (1898) 169 U. S. 366, 42 L. ed. 780 18 Sup. Ct. Rep. 383 (eight-hour law respecting miners).

(8) Subjects discussed in the subtitle which deals with Miscellaneous Enactments. See §§ 2867 *et seq.*, *ante*.

2881e. Same subject further discussed.—In many instances where statutes dealing with the subjects mentioned above have been sustained, the precise grounds of public advantage to which their validity was regarded as being referable were not specified. But one particular consideration has been adverted to so frequently that it demands some notice. The probable effect of legislation in obviating disputes between employers and employees, and the disturbance of the public tranquility which frequently accompanies those disputes, especially when they culminate in strikes, has been adverted to as a justification for the enactment of statutes which imposed upon railway companies a liability for the wages due to the laborers in the service of independent contractors employed to perform construction work;¹ which required certain classes of employers to pay wages in lawful money;² which forbade interstate carriers to discharge servants on account of their being members of labor unions;³ and which established a system of industrial insurance.⁴ This view has been disapproved in other cases.⁵ But there seems to be no sufficient reason for questioning its correctness. It is undeniable that disputes between employers and employees are apt to end in a cessation of work. It is equally undeniable that a cessation of work which results from such a cause is followed, in a large proportion of instances, by acts

¹ *Branin v. Connecticut & P. River R. Co.* (1858) 31 Vt. 214.

² *Re Scrip Bill* (1897) 23 Colo. 504, 48 Pac. 512; *Harbison v. Knoxville Iron Co.* (1899) 103 Tenn. 443, 56 L.R.A. 316, 76 Am. St. Rep. 682, 53 S. W. 960, affirmed in (1901) 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1, (but this point was not adverted to).

³ *Adair v. United States* (1908) 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764, per Holmes, J., in a dissenting opinion.

⁴ In *Cunningham v. Northwestern Improv. Co.* (1911) 44 Mont. 180, 119 Pac. 154, it was laid down that the right of the legislature to pass laws regulating an extrahazardous business, such as coal mining, and to provide for benefits in case of injury or death, may be properly based on the intention to reduce economic waste, to obviate breaches and dissensions between employers and employees, raise the standard of citizenship, and lower the general burden of taxes or taxation,

thereby promoting peace, order, and morals.

⁵ In *San Antonio & A. P. R. Co. v. Wilson* (1892) 4 Tex. App. Civ. Cas. (Willson) 565, 19 S. W. 912, the court observed with regard to a statute providing that railway companies should be liable to a penalty if they failed to pay the wages of their servants within a specified period after demand: "It may be claimed that because railways are public highways, and the companies are common carriers, and their efficiency in public service largely depends on the promptness and fidelity of their employees, unless the employees are promptly paid it will lead to poor service, strikes, and consequent disaster to the interest of the public; that, therefore, the public interests demand their prompt payment. The great difficulty with this argument is to limit it. It extends with more or less force to every public enterprise and agency that contributes to public necessity and convenience. Again, if it be admitted that

of lawlessness. In the face of these patent facts, it is difficult to see upon what ground it can reasonably be contended that legislation which must at least have some tendency to diminish the sources of initiation from which disputes arise is not calculated to promote the general welfare. The validity of such legislation certainly cannot be determined by the easy process of refusing to take judicial notice of the actual conditions by which industrial strife is frequently, if not normally, attended.⁶

It will be observed that all the heads to which the exercise of the

public interest requires prompt payment to prevent strikes and obtain good service, then the state should regulate the amount to be paid, for that is the most fruitful source of strikes. Again, to regulate the amount implies a regulation of the quality and kind of labor, and, by an easy gradation, we get to the right of the state to put men in the various offices to operate and manage the roads (as in fact is largely done now by the courts), and then we would have reached all that is implied in the term, 'government ownership of railways,' without the state's having a dollar's interest therein. Be that as it may, we cannot see how the public interest can be subserved by a statute so unequal, special, and unjust as the one under consideration."

In *State ex rel. Zillmer v. Kreutzberg* (1902) 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098, the court, in discussing an act prohibiting the discharge of servants because of their membership of labor unions, said: "One menace to public welfare was suggested by counsel for plaintiff in error, based upon the assertion that discharges of employees, especially union men, are likely to be followed by turbulence, violence, and even bloodshed; hence that it was proper to deprive employers of their rights, presumably because they are ordinarily lawabiding and will not make trouble. We decline to acknowledge as a fact that the laboring men, as a class, union or nonunion, are more prone to law-breaking or violence than other classes of the community, or to adopt the theory that the legislature so assumed. But even if that assumption were made, it would constitute no justification for depriving one man of his liberty of contract, that another was likely to

commit crimes or breaches of the peace. As well deny the right of private ownership of chattels because they tempt the thief to steal. Neither the restriction imposed nor the penalty is at all relevant to the public purpose sought, nor to the wrongful acts threatened. Nevertheless, the suggested purpose seems to have had weight with the supreme court of Tennessee, in *Harbison v. Knoxville Iron Co.* (1899) 103 Tenn. 443, 56 L.R.A. 316, 76 Am. St. Rep. 682, 53 S. W. 960, as justifying an act compelling mining employers to pay in money orders for coal issued to their workmen. Whether the characteristics of wage earners in Tennessee or the conception of liberty are such to warrant the decision must be left to the courts there. We cannot so view them in Wisconsin. It is the reservation of liberty and pursuit of happiness made by our own Constitution, thus limiting the police power conferred upon our legislature, by which we must be controlled. Thereunder we hold that freedom to make, and even more to refuse to make, contracts, whereby no rights of others suffer, cannot be restricted, unless otherwise will result substantial disturbance of the public health safety, or welfare, and that even a possible tendency of some persons to wrongfully disturb the peace when thwarted of their will constitutes no justification for restraining others of their just rights; nor, if so, is the present act at all calculated or reasonably necessary to prevent the only suggested menace to the community."

⁶ See the remarks quoted in note 5, *supra*, from the opinion in the Wisconsin case. The somewhat paraphrased comparison made in this opinion between the characters of the average workmen in that state and in Tennessee is scarcely convincing

police power is referable raise certain questions of fact. Having regard to this consideration, it might reasonably be expected that the courts in reviewing the action of the legislature would always ascribe at least as much weight to its conclusions with regard to the existence of the conditions which were deemed to justify that action as would be ascribed to the verdict of a jury, founded either upon conflicting testimony, or upon evidence from which more than one deduction might be drawn. But it will be apparent to anyone who examines the cases, that in many instances even this limited measure of deference has not been accorded to a co-ordinate branch of the government. In proof of this assertion it will be sufficient to refer to the decision rendered in the *Lochner Case*.⁷ As has been stated in § 2831, *ante*, Harlan, J., adduced in support of his dissenting opinion, evidence from which it would have been, to say the least, permissible for an intelligent person to infer that protracted labor in bakeries was noxious to the health of employees. In disregarding such evidence the justices who composed the majority of the court were obviously influenced by their economic prepossessions. As a matter of final analysis, therefore, the decision which they rendered may be said to have really rested upon their general views as to the impolicy of restrictive legislation. In this point of view they seem to have clearly contravened the fundamental rule of constitutional law, which forbids the annulment of a statute on the mere ground that it is considered to be an unwise one. Such a situation can scarcely be regarded as satisfactory. But it sets in a strong light the embarrassing consequences of importing purely economic ideas into jurisprudence.

2881f. Improper discrimination between classes of persons.—

A comparison of the cases cited in the preceding subtitles shows very clearly that the divergent views entertained by the courts as to the application of the criteria which determine whether a statute is improperly discriminative in respect of the persons within its purview is accountable for fully as much of the embarrassing conflict of authorities in this branch of constitutional law as the diversity of opinion which prevails concerning the scope of the police power in respect of the restriction of the right of contract. It would be incompatible with the purpose of the present general discussion to undertake anything like a detailed and systematic disquisition upon the intricacies of classification. Abundant examples of the subtle and refined distinctions with which the subject is conversant may

be found in the sections which relate to truck acts (2820), to the computation of wages (2821), and to the modification of the doctrine of common employment (2840 *et seq.*). The cases there cited, as well as many others, indicate that the objection of unequal incidence may yet become,—if indeed it has not already become,—a more formidable obstacle to social reforms than the objection of interference with freedom of contract.¹ The latter objection will presumably lose much of its operative force, as now manifested, when the influence of economic conceptions of a more modern type makes itself more distinctly felt in the courts. But it is by no means clear that this change will affect to any considerable degree the standard with reference to which it is at present determined whether an enactment is unduly discriminative. The theories of a judge concerning the permissible range of the police power in respect of the restriction of contracts—especially contracts of employment,—must be to a large extent colored by the ideas which happen to be current regarding the expediency of governmental restraint of individual liberty for the advantage, actual or assumed, of the community as a whole. But such ideas probably have but little effect in shaping the mental attitude with which he approaches the purely juristic question whether the classification created by a certain statute is valid. Under these circumstances, the reports will furnish a constantly increasing number of cases in which enactments which the people has declared through its representatives to be necessary or advantageous, and which the courts may allow to be constitutional, when tested with reference merely to the scope of the police power, will be annulled on the ground that their purview is too narrow. As at present, the doctrine with regard to the invalidating effect of an improper discrimination will, for practical purposes, operate so that particular classes of citizens which the lawmaking body undertook to restrain from conduct deemed to be improper, will be left free to continue that conduct, simply because other classes of citizens were in a similar position, and no attempt was made to circumscribe their action. The immunity from interference that is obtained in this manner may be an inevitable deduction from recognized constitutional principles as now understood. But the resulting situation would seem to be somewhat anomalous.

¹ The fact that, in the admirable dissenting judgment which he delivered in *Lochner v. New York* (1905) 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133, Holmes, J., declined to express any definite opinion as to whether the enactment under review would also be proof against attack on the ground of discrimination, is sufficiently significant in this connection.

PART III.

ENACTMENTS IN THE BRITISH POSSESSIONS.

2882. Canadian enactments.—In Canada, the partition of duties effected by the British North America act 1867, between the provincial and the Dominion legislatures, has given rise in several instances to the question whether certain Dominion or provincial statutes affecting masters and servants are in excess of the powers reposed in the enacting authority.

An act of the Parliament of Canada (4 Edw. VII. chap. 31) provides that no railway company within its jurisdiction shall be relieved from liability for damages for personal injury to any employee by reason of any notice, condition, or declaration issued by the company, or by any insurance or provident association of railway employees; or of rules or by-laws of the company or association; or of privity of interest or relation between the company and association, or contribution by the company to funds of the association; or of any benefit, compensation or indemnity to which the employee or his personal representatives may become entitled to or obtain from such association; or of any express or implied acknowledgment, acquittance, or release obtained from the association prior to such injury, purporting to relieve the company from liability. It has been contended that this statute is an infringement of the exclusive jurisdiction of the provincial legislature to legislate as to civil rights, and not within the power of the Dominion Parliament to legislate upon matters relating to interprovincial railways. The supreme court held ¹ that the act had such a relation to the operation and manage-

¹ *Re Railway Act Amendment* (1904) 36 Can. S. C. 136. Davies, J., in holding the act to be within the enumerated powers specially conferred upon the Dominion Parliament by the 91st section of the British North America act, said: "Subsection 29 of that section extends the exclusive legislative authority of the Parliament of Canada to such classes

of subjects as are expressly excepted in the enumeration of the classes of subjects by this act assigned exclusively to the legislatures of the provinces.

"The subject-matter here in question comes within the express exception of subsection 10 of § 92, and therefore comes within the 29th enumeration of § 91 of the British North America act

ment of interprovincial railways as to be within the competency of the Dominion Parliament. The question was then carried to the English Privy Council, which held² that the statute was truly railway legislation, and not legislation as to civil rights under the guise of railway legislation.

An enactment by a territorial legislature which provides that a master or employer of labor may, under certain circumstances, be fined for a breach of contract, and in default of payment be impris-

1867, and is excluded from provincial powers by the 10th enumeration of § 92. "Exclusive legislative authority on railways, such as are here enumerated, being vested in the Dominion Parliament, that Parliament has, as a consequence, full and paramount power so to legislate upon such matter as fully, properly, and effectively to carry out the construction, management, and operation of these railways. In so legislating it matters not that they infringe upon the powers of legislation with regard to property and civil rights assigned to the provincial legislatures. Such invasion is admittedly necessary to enable the Parliament properly and effectively to legislate. The main and controlling question is, therefore, whether the legislation in question can be said to be fairly and reasonably within the plenary and exclusive powers of the Dominion Parliament enabling it effectively to control the construction, management, and operation of the classes of railways excepted from subsection 10 of § 92 and embraced within subsection 29 of § 91. I think it may fairly be so held. . . .

"Human agencies are as essential for the proper management and operation of railways as are mechanical agencies, and, so far they relate to these objects, are necessarily subject to the control of Dominion legislation. The former are, of course, from their complex nature, necessarily more difficult to control, and the line up to which and within which the power of the Dominion Parliament extend is difficult to determine and almost impossible to define by any arbitrary rule. But it does seem to me that the hours during which employees may or may not work, the sex, ages, and wages of those who may be employed, the right of employees to combine and form labor unions, the degree and extent to which these unions may be permitted to interfere with the hours, wages, and

work of the men, the negligence which will give employees a right of action caused by it, the limitations which ought to be put upon that right, alike as to the power of the employee to surrender or contract himself out of the right or the power of the railway company, by notice or rule or otherwise, to limit or entirely abolish it, are all subjects well within the Dominion legislative powers, although they may infringe upon the general powers of the local legislatures. These special matters I have mentioned are a few of the many analogous and cognate subjects arising out of the employment by these great railway corporations of many thousands of men whose duties are to control and manage railways forming a perfect network across the Dominion, which subjects must either wholly or partially come within the ambit of the Parliament alone capable of calling these corporations into being, and of effectively regulating their operation."

² *Grand Trunk R. Co. v. Atty. Gen.* [1907] A. C. 65. Lord Dunedin, in delivering judgment, said: "The construction of the provisions of the British North America act has been frequently before their Lordships. It does not seem necessary to recapitulate the decisions. But a comparison of two cases decided in the year 1894, viz., *Atty. Gen. v. Atty. Gen.* [1894] A. C. 189, 63 L. J. P. C. N. S. 59, 6 Reports, 409, 70 L. T. N. S. 538, and *Tennant v. Union Bank* [1894] A. C. 31, 63 L. J. P. C. N. S. 25, 6 Reports, 382, 69 L. T. N. S. 774, seems to establish these two propositions: First, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires*, if the field is clear; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail.

oned, has been held to be a valid exercise of the power of the territorial legislature to enact laws in relation to "property and civil rights," and not to infringe upon the power reserved to the Dominion Parliament by the British North American act to pass statutes regarding criminal offenses.³

By § 4 of the coal mines regulation act of British Columbia (Rev. Stat. 1897, chap. 138), it was provided that no Chinaman should be employed below ground in any mine to which the act applied. A similar provision was inserted in § 12 of the mines (metalliferous) inspection act (Rev. Stat. chap. 134). By the English Privy Council the former of these provisions was held to be *ultra vires* of the provincial legislature, on the ground that its leading feature was to debar all persons belonging to a specified nationality from engaging in a particular kind of labor, and that, under § 91, subs. 25, of the British North America act, the power to legislate on such a subject was reserved exclusively to the Dominion Parliament.⁴ The provincial legislature then enacted, as rule 34 of § 82 of the same act, an amended provision to the effect that no Chinaman or person unable to speak English should be appointed to any place of trust in or about a mine whereby, through his ignorance or carelessness, he might en-

"Accordingly, the true question in the present case does not seem to turn upon the question whether this law deals with a civil right,—which may be conceded,—but whether this law is truly ancillary to railway legislation.

"It seems to their Lordships that, inasmuch as these railway corporations are the mere creatures of the Dominion legislature,—which is admitted,—it cannot be considered out of the way that the Parliament which calls them into existence should prescribe the terms which were to regulate the relations of the employees to the corporation. It is true that, in so doing, it does touch what may be described as the civil rights of those employees. But this is inevitable, and, indeed, seems much less violent in such a case where the rights, such as they are, are, so to speak, all *intra familiam*, than in the numerous cases which may be figured where the civil rights of outsiders may be affected. As examples, may be cited provisions relating to expropriation of land, conditions to be read into contracts of carriage, and alterations upon the common law of carriers.

"In the *factum* of the appellants it is

(*inter alia*) set forth that the law in question might 'prove very injurious to the proper maintenance and operation of the railway. It would tend to negligence on the part of employees; and other results of an injurious character to the public service and the safety of the traveling public would necessarily result from such a far-reaching statute.'

"This argument is really conclusive against the appellants. Of the merits of the policy their Lordships cannot be judges. But if the appellants' *factum* properly describes its scope, then it is indeed plain that it is properly ancillary to through railway legislation."

³ *Re Gower v. Joyner* (Sup. Ct. N. W. T. 1896) 17 Can. Law Times Occ. N. 298 (Rev. Ord. of North West Territories, § 4).

⁴ *Union Colliery Co. v. Bryden* [1899] A. C. 580, 68 L. J. P. C. N. S. 118, 15 Times L. R. 508 (action by shareholder of company for a declaration that the employment of Chinamen below ground was unlawful). This decision overrules *Re Coal Mines Regulation Amendment Act, 1890* (1896) 5 B. C. 306, which, however, was not referred to in the judgment of the Privy Council.

danger the life or limb of any person employed about the mine, or be employed below ground, or at the windlass of a sinking pit (B. C. Stat. 1903, chap. 17, § 2). By the supreme court of the province this provision was held to be a substantial re-enactment of that which had previously been declared unconstitutional by the Privy Council and therefore invalid for the reasons assigned by that tribunal.⁵

2883. Australian enactments.—“The scheme of the Australian Constitution, like that of the United States of America, is to confer certain definite powers upon the Commonwealth, and to reserve to the states, whose powers before the establishment of the Commonwealth were plenary, all powers not expressly conferred upon the Commonwealth.”¹ This division of legislative powers has given rise, in connection with divers enactments touching the relation of master and servant, to the question whether they are within the powers granted to the Commonwealth Parliament.

A statute of the Commonwealth (act No. 16 of 1906) imposing an excise duty on certain goods contained an exception in favor of “goods manufactured by any person in any part of the Commonwealth under conditions as to remuneration of labor which (a) are declared by resolution of both Houses of Parliament to be fair and reasonable; or (b) are in accordance with an industrial award under the Commonwealth conciliation and arbitration act 1904; or (c) are in accordance with the terms of an industrial agreement filed under the Commonwealth conciliation and arbitration act 1904; or (d) are, on an application made for the purpose to the president of the Commonwealth court of conciliation and arbitration, declared to be fair and reasonable by him, or by a judge of the supreme court of a state, or any person or persons who compose a state industrial authority to whom he may refer the matter.” It was contended that, notwithstanding the title and phraseology of the act, it was in substance not an exercise of the powers of taxation conferred on the Parliament by the Constitution, but an attempt to regulate the internal trade and industry of the states, which, it was said, is not within the powers of the Parliament, but is reserved to the states; and this contention was sustained by the High Court, which also held that, even if it were

⁵ *Re Coal Mines Act* (1904) 10 B. C. 408 (diss. Martin, J.); *Rex v. Priest* (1940) 8 Can. Crim. Cas. 265.

A motion by the attorney general for an injunction to restrain the employment of Chinamen in contravention of the act had previously been denied on

the ground that no matter of public concern was involved. *Atty. Gen. v. Wellington Colliery Co.* (1904) 10 B. C. 397.

¹ Per Griffith, Ch. J., in *Rex v. Barger* (1908) 6 C. L. R. (Austr.) 41.

within the competence of the Commonwealth Parliament to deal with the conditions of labor, the act would be invalid as being a contravention of § 55 of the Constitution, which declares that "laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter, shall be of no effect;" and, further, that even if the term "taxation," uncontrolled by any context, were capable of including the indirect regulation of the internal affairs of a state by means of taxation, its meaning in the Constitution is limited by the implied prohibition against direct interference with matters reserved exclusively to the states.²

² *Rea v. Barger*, supra, where it was said by Griffith, Ch. J.: "It is clearly within the competence of a state legislature to regulate the conditions of labor employed in the manufacture of agricultural implements. It is equally clear that a state legislature, having prescribed such conditions, could impose a pecuniary burden upon everyone who did not conform to them, and that the payment might be made proportionate to the number of articles produced. Yet, if such payment were a duty of excise, the state could not impose it, for the power of the Parliament to impose duties of excise is exclusive. Such an act might be framed in several different ways. It might be prescribed that certain conditions as to the remuneration of labor should be observed in the manufacture, and that any manufacturer who failed to comply should be liable to a penalty of so much for every article manufactured. Or, without formally prescribing any such condition, it might provide that any manufacturer who did not observe certain conditions should be liable to a penalty of so much per article. Or it might, instead of using the word 'penalty,' say that the manufacturer who did not comply with certain conditions should be bound to pay a license fee, the amount of which should be computed at so much for every article manufactured. Or it might provide that every manufacturer should, at his option, either comply with certain prescribed conditions, or pay to the state treasurer a sum computed, etc., and, in default, should be liable to a penalty of, etc. Or, finally, it might provide that any manufacturer who did not comply with certain specified conditions should pay a tax at a specified rate. In all the cases supposed, the substance would

be the same, though the form would differ. And in every case, the substance would be a regulation of the conditions of labor in the industry in question. Attention has already been drawn to the immateriality, as far as regards the validity of an act, of the motives or indirect results in contemplation of the legislature. The professed purpose of an act is generally stated in its title. In any of the cases supposed, the purpose of the act apparent on its face, whatever attempt might be made to disguise it in the title, would be, not to raise money for the purposes of government, but to regulate the conditions of labor. From this point of view an inquiry into the purpose of an act is not an inquiry into the motives of the legislature, but into the substance of the legislation. And for the purpose of determining whether an attempted exercise of legislative power is warranted by the Constitution, regard must be had to substance, to things, not to mere words.

"In our opinion the exclusive power of the Parliament to impose duties of excise cannot be construed as depriving the states of the exclusive power to make such enactments as we have suggested above. The substantial nature and character of the legislation is the same whether it is passed by one legislature or the other. It follows that such an act would not be in substance an act imposing duties of excise within the meaning of § 90 of the Constitution. If, then, the act in question is not, in substance, an act imposing duties of excise, what is it? We think that it is an act to regulate the conditions of manufacture of agricultural implements, and not an exercise of the power of taxation conferred by the Constitution."

The Commonwealth Parliament has also been held to have exceeded its power in enacting the seaman's compensation act of 1909, which by its terms applied (under certain conditions) to ships engaged in the coasting trade, and which itself obviated any doubt as to whether it was to be restricted to vessels trading between ports of different states by expressly declaring that a ship is to be deemed engaged in the coasting trade, within the meaning of the act, if she takes on board passengers or cargo at any port in a state to be carried to and landed or delivered at any port in the same state. The High Court, in reaching this conclusion, held that the power to make laws with respect to trade and commerce with other countries and among the states (Constitution, § 51, pl. i.) does not authorize the Parliament to legislate with respect to the internal trade of state; that § 98 of the Constitution, which declares that the power in question extends to navigation and shipping, does not enlarge the ambit of the power; that the act could not be supported as an exercise of the power conferred by § 76, pl. iii. to make laws conferring original jurisdiction on the High Court in any matter of admiralty and maritime jurisdiction; and that, the Parliament having in plain language expressed its intention that the test to be applied in determining what ships come within the act is whether the ship is engaged in trade between port and port, and not whether she is engaged in trade between state and state, the valid and invalid provisions of the act are inseparable, and the whole act is invalid.³

The validity of various provisions of the Commonwealth conciliation and arbitration act 1904 (for a summary of which see § 2770) has also been questioned on constitutional grounds.

The High Court of the Commonwealth has held that this statute, in making arbitration of labor disputes compulsory, does not exceed the power granted by the Constitution (§ 51, pl. xxxv.) in providing that "the Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to . . . conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state,"—voluntariness in the submission to the authority of the tribunal and choice of some part of the tribunal by the disputants not being essential elements of the concept of arbitration, although *de facto* incidents thereof at common law.⁴

³ *The Kalibia v. Wilson* (1910) 11 C. L. R. (Austr.) 689. *ciliation & Arbitration* (1910) 11 C. L. R. (Austr.) 1. Upon this aspect of the

⁴ *Rex v. Commonwealth Ct. of Con-* question Griffith, Ch. J., said:

The act in question creates a system by which organizations of employers and associations of employees may, on complying with certain conditions, be registered as organizations, by virtue of which registration they become corporations for the purposes of the act,

"I proceed to deal with the points taken by the order nisi.

"The first is that the Commonwealth conciliation and arbitration act is beyond the power of the Parliament. This objection is put in two ways: (1) That the constitution of the court is not such as is authorized by the power to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending etc. (2) That several of the provisions of the act, notably that relating to the 'common rule,' are not within the power; that those provisions are so intimately bound up with the rest of the act, that, if they are eliminated, the rest of the act will have a substantially different character, and that the whole act is therefore invalid. I will deal with these objections in order.

"The first is founded upon the meaning of the word 'arbitration,' which, it is contended, had in 1900, when the Constitution was enacted, a well-known meaning in the English language, as well with regard to industrial matters as others.

"It is argued that the concept of arbitration and of an arbitrator included *inter alia* the following elements: (1) That the submission to the authority of the tribunal was voluntary; (2) that at least some part of the tribunal was chosen by the disputants themselves, either by direct or indirect choice; (3) that the tribunal was not fettered by the ordinary formalities of legal procedure, and its functions were not limited to determining existing rights, but might extend to prescribing rules of conduct for the future, provided that the award did not direct the doing of any act forbidden by law; or, in other words, that it could order to be done anything that the parties themselves might have agreed to do, but no more; (4) that the function of an arbitrator was a judicial function, which could only be exercised between the parties to the dispute, and only after giving them an opportunity to be heard.

"It will be perceived that the first two of these propositions relate to the con-

stitution of the tribunal, the two latter to its functions when constituted. These are entirely distinct questions.

"As to the first question, there is no doubt that according to the common law there could not be arbitration without voluntary submission, which was the basis of the award, and the award was enforced by proceedings founded upon the submission. In effect, therefore, the term 'arbitration,' as originally used in England, applied to a procedure which in fact depended upon the voluntary submission of the parties to the decision of arbitrators whom they had themselves chosen.

"But it does not follow that these incidents, which were *de facto* inseparable from the procedure of arbitration, thereby became essential elements of the concept.

"By a series of statutes, of which the common-law procedure act 1854 may be taken as an instance, the element of voluntary submission was eliminated, and compulsory arbitration has long since become a familiar term, meaning that the parties are required by law to submit the matter in question to arbitrators instead of to a regular court of justice. The right of a voice in the choosing of the arbitrators was, however, generally left to them. Up to 1900 no English statute had made any provision for arbitration in industrial disputes except on these conditions. Nor had any of the few experimental enactments that had been passed in Australasia excluded the right of direct or indirect choice.

"These considerations are, in my opinion, of great weight, but they do not determine the question whether the elements of voluntary submission and choice were part of the original concept of arbitration, which should be treated as having only been modified so far as expressly declared by some law, or whether they are incidental attributes which had been temporarily added to that concept by reason of the operation of the common law. To solve this question recourse may be had to other instances of the use of the word, and the

representing their members collectively. The purpose is to provide some method of representation of the parties to an industrial dispute in its initial stages, of bringing the parties before the court, and of enforcing observance of the award. These provisions, notwithstanding the circumstance that they permit the registration of organizations which are not in themselves capable of being a party to a dispute extending beyond the limit of any one state, have been held to be valid as being incidental to the power conferred by the constitutional provision above quoted, inasmuch as such an organization may be capable of becoming a party to a dispute extending beyond the limits of any one state as member of a combination of the organizations of more than one state acting together in carrying on an industrial dispute for the attainment of a common end.⁵

series of statutes mentioned by my brother Isaacs indicate to my mind conclusively that, for a long time before 1900, the words 'arbitrator' and 'arbitration' had been used by the English Parliament to denote a tribunal with respect to which the essential element of the concept was absolute discretionary power, only fettered by the limits of the dispute submitted to arbitration and the law of the land. The word 'arbitrator' had been used in the same sense in the Queensland railway act 1872, which left the assessment of compensation for land taken for railway purposes to the determination of a single person called the railway arbitrator.

"I think, therefore, that the elements of voluntariness and choice must be regarded as accidents, and not essentials. and that the constitution of the Commonwealth court cannot be objected to on this ground."

⁵ *Jumbunna Coal Min. Co. v. Victorian Coal Miners' Asso.* (1908) 6 C. L. R. (Aust.) 309, where O'Connor, J., in discussing the question, said: "The appellants' first contention is that the registration is invalid because the respondent association is one which could not be concerned in a dispute extending beyond the limits of any one state. That position involves the assumption that no organization can be validly registered which is not at the time of registration capable in itself of being concerned in a dispute extending beyond the limits of any one state. There is no such qualification of the right to register on the face of the act, nor can it be implied from any of its provisions. The

objection is therefore really to the constitutionality of the enactment, and may be thus stated. Parliament is empowered by the Constitution to legislate only with respect to disputes extending beyond the limits of any one state. It is conceded that legal bodies might be created to represent groups of employers and employees for purposes of procedure. But the authority of Parliament extends only, it is contended, to the creation of such bodies as are in themselves capable, from the moment of their existence, of being parties in such a dispute.

"In examining this contention it becomes necessary to inquire into what amounts to an industrial dispute extending beyond the limits of any one state, within the meaning of the Constitution. That the parties on either side should be organized in any permanent form of combination is not essential. If all the workmen of an employer in a particular trade take concerted action in demanding and endeavoring to enforce from him some alteration in their conditions of employment, there is an industrial dispute. If all the workmen throughout the state in the same trade unite in the making and endeavoring to enforce the same demand from their respective employers, there is an industrial dispute involving the whole trade throughout the state. If the workers so united obtain the co-operation of their fellow workers in the same trade in another state in such a way that the combined workers in the trade in both states take concerted action against their respective employers in both

But the conciliation and arbitration act, so far as it purports to affect state railways, has been held to be beyond the power vested in the Commonwealth Parliament by Constitution, § 51, pl. xxxv. (*ubi supra*) notwithstanding the provisions of § 51, pl. i. empowering Parliament to make laws for the peace, order, and good government of the Commonwealth with respect to trade and commerce among the states, and of § 98, that "the power of the Parliament to make laws with respect to trade and commerce extends . . . to railways the property of any state," the court taking as its guiding principle the rule that the states are immune from interference on the part of the Commonwealth with any of their instrumentalities (of which a state railway is held to be one), unless such interference is expressly authorized by the Constitution.⁶

states for the making and enforcing of the same demands, there is an industrial dispute extending beyond the limits of one state. It is not at all essential to the concept of such a dispute within the meaning of the Constitution, that the workmen should be combined in any formal interstate union, any more than it is necessary, to constitute an industrial dispute within the limits of a state, that it should be carried on by a trade union representing the workers in that trade.

"On the other hand, the workers in the trade in both states may be combined in some permanent form of interstate union; or the workers in each state may be combined in some permanent form of state union, and the two state unions may combine and agree upon joint action against their respective employers for the purpose of making and enforcing the same demands in both states. In each case the industrial dispute is between the united body of workmen and their employers. Where the workmen of both states combine to take united action for the purpose of gaining the same alteration of conditions of employment in both states, it is immaterial whether the combination is of individuals or of unions, whether the unit of the combination is the workman or the union.

"Such being the nature of the disputes covered by the Constitution, it was open to the legislature to adopt any method which they deemed effective for prevention and settlement by conciliation and arbitration. They might, if they had thought fit, have dealt with the individ-

ual workman or employer as the unit of combination, and provided for the registration of all workmen and all employers in a trade as a step in aid of procedure. It was equally open to them to take the state trade union or association as the unit of combination, and provide for their registration as a step in the same direction. For, as the individual workman may, in combination with other workmen in his own or another state, become concerned in an industrial dispute extending beyond the limits of any one state, so a state trade union or state association of workmen may, by combination with trade unions or associations of workmen in another state, become concerned in such a dispute.

"It follows that the power of Parliament would extend to the creation of organizations such as those contemplated by the act, even though they might be incapable at the time of registration of being in themselves parties to an industrial dispute within the meaning of the Constitution, provided that they are so constituted as to be capable of becoming at any time parties to such a dispute as members of a combination of the organizations of more than one state acting together in carrying on an industrial dispute for the attainment of a common end."

⁶ *Railway Employees' Case* (1906) 4 C. L. R. (Austr.) 488. in which it was said: "The argument as presented to us is that state instrumentalities for the purposes of the doctrine in question are limited to those which are, strictly speaking, of what was called in argu-

It has also been decided that it is not competent for the Commonwealth Parliament to empower the Commonwealth court of conciliation and arbitration to make an award inconsistent with a state law, or with a determination of a state board having, by virtue of statute, the force of a positive legislative enactment; and that such an award does not have the force of a Federal enactment within the meaning of

ment a 'governmental' character, and that the business of common carriers is not a part of any of the recognized branches of government, legislative, judicial, and executive. We apprehend, however, that the execution or administration of the laws of the state is, in the strictest sense, a governmental function, and that no rule can be formulated, because there is no authority competent to formulate it, which shall prescribe what functions the state shall undertake in the supposed exercise of its duty to promote the well-being of its people. There is high authority, both ancient and modern, for holding that the construction and maintenance of roads and means of communication is one of the most important, as it is necessarily one of the first, of the functions of government. It cannot be denied in this twentieth century that railways are a most important means of communication, or that they are in substance highways, however their use may be restricted or controlled by the conditions of the particular franchises granted in respect of them. Apart, however, from this general consideration, we are of opinion that in the year 1900, when the Constitution was adopted, the construction and maintenance of railways was in fact generally regarded as a governmental function in all the Australian Colonies, and that they are expressly recognized as such in the sections of the Constitution above quoted. We think, therefore, that the doctrine of mutual freedom from interference, as between the Commonwealth and state governments, would be sufficient to exclude any implication that § 51 (xxxv.) was intended to extend to state railways. And, having regard to the careful enumeration of specific matters in respect of which express powers were conferred upon the Commonwealth, Parliament to interfere with or control these railways, we think that the notion of such an implied extension is absolutely negatived.

"It is therefore unnecessary to examine. M. & S. Vol. VIII.—559e.

press any opinion on the question whether a dispute between the applicants and the railways commissioners could, in point of law, be held to extend beyond the limits of the state.

"For these reasons we are of opinion that the provision now in question cannot be supported as a valid exercise of the powers conferred by § 51 (xxxv.)

"We pass to the contention that it is a valid exercise of the power expressed in § 51 (I.), "to make laws for the peace, order, and good government of the Commonwealth with respect to trade and commerce with other countries and among the states," which is declared by § 98 to extend to railways the property of any state.

"As at present advised, we are of opinion that the legislative authority of the Commonwealth Parliament under the power in question, so far as regards wages and terms of engagement, does not extend further—if it extends so far, as to which we reserve our opinion—than to prohibit, for causes affecting interstate traffic, specific persons from being employed in such traffic. It cannot, as already said, be disputed that the plenary powers of the state legislatures with respect to matters within their competence extend to everything done within the state which may, directly or indirectly, affect trade and commerce. But we think that the power of the Commonwealth Parliament to regulate interstate trade and commerce, although unlimited within its ambit, cannot, as a mere matter of construction, be held to have so wide an ambit as to embrace matters the effect of which upon that commerce is not direct, substantial, and proximate. And, in our opinion, the general conditions of employment are not of this character. We arrive at this conclusion upon the mere language of § 51 (I.) But it is much fortified by the language of (xxxii.), which expressly empowers the Commonwealth Parliament to make laws for the control of state railways

the constitutional provision (§ 109) that, "when a law of a state is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid." 7

with respect to transport for the naval and military purposes of the Commonwealth. Having regard to the rules of construction adverted to in the earlier part of this opinion, we think it is hard to reconcile the conferring of this express power with the implied existence under § 51 (1.) of a power which would undoubtedly, if the larger construction contended for is adopted, not only include that conferred by (1.), but go far beyond it. The word 'control' as used in (xxvii.) cannot, we think, be limited to manual or physical control. It is the widest possible term, and is at least co-extensive with the asserted general power to 'regulate.'

"Assuming, however, that the power in question does extend to the regulation by law of the terms of employment upon state railways, it is clear that it extends to them only so far as regards interstate traffic, and only as far as regards men engaged in that traffic. And this consideration affords a fatal objection to the validity of the provision now in question, so far as it depends for support on the trade and commerce power."

⁷ *Australian Boot Trade Employees' Federation v. Whybrow* (1910) 10 C. L. R. (Austr.) 266 (Isaacs and Higgins, JJ., dissenting.) Griffith, Ch. J., said: "The question turns upon the construction of pl. xxxv. of § 51 of the Constitution, which empowers the Parliament to make laws for the peace, order, and good government of the Commonwealth with respect to conciliation and arbitration for the settlement of industrial disputes extending beyond the limits of any one state.

"It must now be taken to be the settled law of the Commonwealth that, as I said in the *Woodworkers' Case*, 8 C. L. R. (Austr.) 465, at p. 492, 'pl. xxxv. is to be construed having regard to the rest of the Constitution, and particularly with reference to the doctrine repeatedly laid down by this court that any invasion by the Commonwealth of the sphere of the domestic concerns of the states appertaining to trade and commerce is forbidden, except so far

as the invasion is authorized by some power conferred in express terms or by necessary implication.' The same principle, of course, applies to the police powers of the states.

"I decline to go again over the ground traversed in the cases in which that rule was established. The question, then, is, To what extent does the power under consideration authorize such an invasion? I answer the question by quoting my own language in the same case (8 C. L. R. (Austr.) 465 at p. 492). 'The answer is,—so far as necessary for its effective exercise. What then is the power? We are not concerned with the political question, now hotly debated, whether it is desirable that the Federal Parliament should have paramount authority to determine all conditions of employment in the Commonwealth. Our duty is to interpret the Constitution as it stands, not according to any preconceived notions as to what it ought to be. Now, as already pointed out, the power is not a general power to make laws for the settlement of industrial disputes. A power conferred in such terms would *prima facie* authorize an invasion of the whole field of the conditions of employment so far as might be necessary for their settlement. The power is limited to making laws for their settlement by arbitration. The term "arbitration" connotes a judicial tribunal, by whatever name it is called and however constituted, and, although the functions of the tribunal differ from those of ordinary tribunals, in that they are not limited to determining existing causes of action, but extend to prescribing conditions to be observed in future contracts of employment, the tribunal is no less a tribunal. To my mind the obligation to decide in accordance with law is implied in the notion of the creation of a tribunal. Otherwise, the members of the tribunal would not be judicial persons at all, but dictators or lawgivers exercising the power of legislation, not of adjudication.

"It is gravely maintained, however, that the tribunal which the Parliament may establish for the settlement of in-

And the provision of the act (§ 30) that, "when a state law, or an award, order, or determination of a state industrial authority, is inconsistent with an award or order lawfully made by the court, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid," has been said to be either *ultra vires* or superfluous.⁸

The provision (38 f) empowering the arbitration court to declare by any award or order, upon due notification and hearing, that any practice, regulation, rule, custom, term of agreement, condition of employment or dealing whatsoever determined by an award in relation to any industrial matter shall be a common rule of any industry in connection with which the dispute arises, has been held to be *ultra vires* the Commonwealth Parliament, as a delegation of legislative power; but to be so severable from the other provisions of the act as to prevent the whole act being thereby rendered unconstitutional.⁹

dustrial disputes is not bound by any state laws relating to domestic trade, and that, although the Parliament itself could not make a law inconsistent with the state law, it can, under the language of pl. xxxv., authorize its creature, the tribunal of arbitration, to disregard the state law, to free persons from any obligation to obey it, and even impose penalties upon persons who do obey it, because such power is necessary for the effective settlement of industrial disputes. I have already pointed out that discontent with a state law cannot be described as a dispute in any sense in which that word has hitherto been used, so that a power to authorize the settlement of disputes cannot be read as a power to set aside or suspend or abrogate an obnoxious law. But, even if it could, it seems to me that, applying the rules of construction of the Constitution so often laid down, at best the language would be ambiguous, and that, even if the words are capable of the meaning asserted, it is so inconsistent with the reservation to the states of the power to regulate their domestic trade that it should be rejected. For, if conceded, it practically annuls that reservation, and permits the Federal tribunal to substitute its uncontrolled volition for the will of the Parliaments of the states, so soon as a political agitation for the repeal of an obnoxious law in any state is taken up by sympathizers in another state.

"I find it difficult to treat such an argument with due gravity. It may be necessary, in order to allay political agitation, for the legislature to repeal or alter an existing law, but it cannot be said to be necessary that a tribunal appointed to settle disputes by arbitration should have a dispensing power authorizing it to supersede or abrogate a law or excuse obedience to it, unless, indeed, it is assumed that a dispute cannot be settled unless one (and, of course, only one) of the parties to the dispute gets all that he asks. This would be an entirely novel meaning of the word, and would put the tribunal above the law. *Sic volo, sic jubeo, mea sit pro lege voluntas.*"

The question was also discussed in *Federated Saw Mill v. Moore & Son Proprietary* (1909) 8 C. L. R. (Austr.) 465, in which, however, the court was evenly divided.

⁸ Per Griffith, Ch. J., in *Rex v. Commonwealth Ct. of Conciliation & Arbitration* (1910) 11 C. L. R. (Austr.) 1.

⁹ *Rex v. Commonwealth Ct. of Conciliation & Arbitration*, supra. Upon this point Griffith, Ch. J., said: "I turn now to the second objection to the validity of the act. I remark, at the outset, that the act is obviously based upon the model of acts which had, before 1904, been passed by the legislatures of New South Wales and New Zealand. Those legislatures had plenary authority to deal with and regulate

all industrial matters within their territories, and it was immaterial whether they so dealt with them directly or by means of a delegated authority, or whether the powers delegated to a subordinate authority were judicial or legislative. But under the Constitution of the Commonwealth, the Parliament has no plenary power of legislation as to such matters. The power is limited to making laws with respect to arbitration for the settlement," etc.

"In my opinion the argument that the word 'arbitration' connotes that the function of an arbitrator is a judicial function, which can only be exercised between the parties to a dispute and after hearing them, is incontestably right.

"It follows that the only power which the Parliament can confer upon the arbitrator is a judicial or arbitral power, to be exercised on these principles, and that it cannot confer upon him any legislative functions. In the decision upon the case stated between the present parties (10 C. L. R. [Austr.], 266) this court denied to the Commonwealth court of arbitration any legislative authority.

"The objection taken to the provisions of the Commonwealth conciliation and arbitration act 1904, as to the common rule, is that they purport either to confer a legislative authority properly so called, or at least to authorize the arbitrator to make an award binding upon persons not parties to the dispute before him, which, it is said, is in substance, if not in form, an act of legislation, and not an act of a judicial nature. Sec. 38 (f) purports to authorize the court to declare that any condition of employment, etc., determined by an award, shall be a common rule of an industry (*scil.* throughout the states to which the dispute extends and in connection with which the dispute arises). This, it is said, is a legislative, and not a judicial, function.

"Sec. 30 provides that 'when a state law or an award, order, or determination of a state industrial authority is inconsistent with an award or order lawfully made by the court, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.'

"This section is obviously based upon the notion that the award is a legislative act, or at least has the same effect

as legislation. It has been pointed out in previous cases that this section is either *ultra vires* or superfluous. Other sections were also referred to.

"It is plain that the act was framed and passed upon the assumption that the Parliament had power not only to make provision for the settlement of disputes between the parties to them, but, as an incident to such settlement, to regulate the whole industry concerned. If the whole industry is involved in the dispute, the regulation of it is, of course, an incident to the settlement of the dispute. This consideration may afford some ground for thinking that the power conferred by the Constitution was only intended to apply to disputes of such a nature, but, as the case has not been argued on this basis, I will say no more on that point. It is contended, on the other hand, that the power to regulate the whole of an industry is a necessary incident of a power to settle a dispute between some parties engaged in the industry. It may be that, by reason of extrinsic causes, the settlement will not prove effective. The argument that a judicial power to settle disputes should be supplemented by legislation to make the award binding upon nondisputants may be a good political argument to be addressed to a legislature having power to make such a supplementary enactment, but it has nothing to say to the question of the extent of the power to settle. The question is one of great importance, but, in the view which I take of the question of severability, it is not necessary to determine it in this case. I will assume, therefore, that the provisions objected to are *ultra vires*.

"Thus regarded, the act consists of two parts, one providing for the settlement of disputes *inter partes*, the other for the regulation of industry in general. Are they severable? It is contended, on the authority of decisions of the Supreme Court of the United States, which are entitled to the greatest respect, that the test is this, that, if the court, on a consideration of the whole statute, and rejecting the parts held to be *ultra vires*, is unable to say that the legislature would have adopted the rest without them, the whole statute must be held invalid. With profound deference I venture to doubt the accuracy of this test. What a man would have done in a state of facts which never existed

is a matter of mere speculation, which a man cannot certainly answer for himself, much less for another. I venture to think that a safer test is whether the statute, with the invalid portions omitted, would be substantially a different law as to the subject-matter dealt with by what remains, from what it would be with the omitted portions forming part of it.

"It is contended that the arbitrator, in making an award, must necessarily take into account his power to extend its operations to the whole industry, and so obviate the very apparent difficulties which might arise from unequal competition between persons fettered by the award and those left free, and that the awards which he would be likely to make in view of that power and in view of its absence might be very different. I agree. But by § 38 (o) the court is authorized to vary its awards and to reopen any question. This, in effect, means that an award is to be regarded

as being in the first instance tentative and provisional only. The objection does not, therefore, I think, show a difference between the substantial effect of the act with the invalid provisions and without them, but a difference in the probable form of an award, which the court is authorized to modify from time to time.

"It is quite conceivable that the Parliament, if it had been present to their minds that it was doubtful whether they had power to authorize the regulation of industry in general as well as to settle disputes in an industry, would have determined to exercise the latter power at any rate. And, on the whole, I am unable to say that the act, with the allegedly invalid provisions omitted, is so substantially different a law as to what is left from what it would be with those provisions included, that the court would, by sustaining the validity of what is left, be making a law which the Parliament did not make."

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